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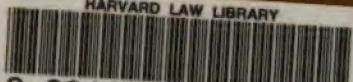
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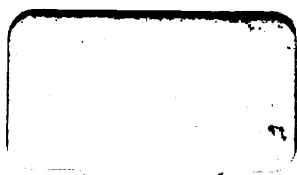
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VOL. VI.

Indiana. Supreme Court

REPORTS ⁴

OF

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IN THE

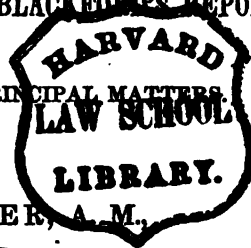
SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

BEING AN OFFICIAL CONTINUATION OF BLACKFORD'S REPORTS,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS



BY ALBERT G. PORTER, A. M.,

OFFICIAL REPORTER.

VOL. VI

CONTAINING THE CASES FROM THE FIFTEENTH DAY OF NOVEMBER TERM, 1854, TO
THE END OF MAY TERM, 1855, INCLUSIVE, AND THE CASE OF BEEBE v.
THE STATE, DECIDED AT THE NOVEMBER TERM, 1855.

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1856.

Entered according to the Act of Congress, in the year one thousand eight hundred and fifty-six, by

ALBERT G. PORTER,

in the Clerk's office of the District Court of the United States, within and for the District of Indiana.

Rec Sept 10. 1857

9/5/1857

JUDGES
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

SAMUEL E. PERKINS,
ANDREW DAVISON,
WILLIAM Z. STUART,
ALVIN P. HOVEY,*
SAMUEL B. GOOKINS.†

* Appointed by the Governor, *May* 8, 1854, until the election next succeeding the appointment, to supply the vacancy occasioned by the resignation of Judge ROACHE.

† Elected by the People, *October* 10, 1854, to supply the vacancy occasioned by the resignation of Judge ROACHE.

The revised statutes of 1852 provide that the Judges of the Supreme Court shall, at each term, choose one of their number Chief Justice, who shall preside at the consultations of such Judges, and in Court; but no Judge is allowed to preside at two terms consecutively, nor until the other Judges have each presided one term. Judge PERKINS presided as Chief Justice at the *May* Term, 1855, and Judge DAVISON at the *November* Term, 1855.

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PREVIOUS DECISIONS
OF THE
SUPREME COURT OF THIS STATE,
OVERRULED IN THIS VOLUME.

HARNEY v. OWEN, 4 Blackf. 337.

If a minor, on the ground of his infancy, rescind a contract which had been fairly executed, and which was apparently to his advantage, he can not afterwards sue for the money or property advanced, or labor performed, by him under such contract.

Overruled in *Van Pelt v. Corvine*, 363.

THE CITY OF MADISON v. HATCHER, 8 Blackf. 341.

The city of *Madison* brought an action of debt against *H.*, before the mayor, who had the criminal jurisdiction of a justice of the peace, to recover a penalty, under the charter of said city, for an assault and battery. An assault and battery being a criminal offence under the statute of the state, *held*, that, under the constitution, the suit could not be maintained.

THE CITY COUNCIL OF INDIANAPOLIS v. BLYTHE and Another, 2 Ind. R. 75.

Debt by the city council of *Indianapolis* against *B.* and another to recover a penalty from them for keeping a nuisance, &c. A nuisance being a criminal offence, as well under the statute of the state, as by the common law, *held*, that the action could not be maintained.

DEGANT v. MICHAEL, 2 Ind. R. 396.

DONNELL v. THE STATE, 3 *id.* 480.

Section 115 of chapter 53 of the R. S. 1843, which provides that "if any person, without proper authority, shall give to any one owing service in any state or territory within the *United States*, a certificate or other testimonial of emancipation, or shall knowingly harbor or employ any such one, owing service as aforesaid, or held as a slave, who may have come into this state without the consent of his or her owner, or shall encourage or assist any such one to desert or not go with his or her owner, or shall use any violence or other means to prevent, let, or hinder any person in lawfully recovering any fugitive slave or person owing service, such person so offending, shall, upon conviction thereof, be fined," &c., is unconstitutional and void.

The doctrine of the four last-cited cases is overruled in *Ambrose v. The State*, 350, and *The State v. Moore*, 436.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1854, IN THE THIRTY-
NINTH YEAR OF THE STATE.

MILLER v. SNYDER.

A judge of the Court of Common Pleas may, under the R. S. 1852, grant the writ of *habeas corpus* to a prisoner detained in the state prison under sentence for a felony.

If the detention of the prisoner is illegal, it is the duty of the judge to deliver him therefrom.

The detention is illegal, if by virtue of the judgment and sentence of a Court which had no jurisdiction of the cause.

The case of *Simington v. The State*, 5 Ind. R. 479, in which it was held that the act providing for the organization of Circuit Courts, &c., approved June 1, 1852, repealed so much of the act establishing Courts of Common Pleas, &c., approved May 14, 1852, as conferred upon the latter Courts jurisdiction, in certain cases, over felonies, referred to, and the decision approved.

A judge of the Court of Common Pleas, upon the hearing on the return to a *habeas corpus*, may, both by the R. S. 1852, and by the general principles of law, inquire into the jurisdiction of the Court by whose sentence a prisoner is detained.

A prisoner was committed to the county jail by the judge of the Court of Common Pleas of *Laporte* county, rightly, as an examining Court, upon a complaint charging him with the commission of a felony; but the Court, having no jurisdiction to try felonies, proceeded to the trial of the prisoner and sentenced him to confinement in the state prison. While in confinement under the sentence, he applied to the judge of the Court of Common

Note.—The opinions delivered during the first fourteen days of this term are contained in 5 Ind. Reports.

6	1
133	100
6	1
157	175

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Pleas of *Clark* county for a writ of *habeas corpus* against the warden of the state prison, to show cause why he was detained, &c. The warden having produced the prisoner, returned, as the cause of his detention, the record of the prosecution in the Court of Common Pleas of *Laporte* county, and the conviction and sentence in the case. The judge ordered the prisoner to be discharged from the state prison, and returned to the jail of *Laporte* county, to await the further action of the Courts of said county. *Held*, that the order of the Court was correct.

Wednesday,
December 13.

APPEAL from an order of the judge of the Court of Common Pleas of *Clark* county, made in vacation.

PERKINS, J.—Motion for a *supersedeas*.

Benjamin T. Snyder petitioned judge *Lovering*, of the Court of Common Pleas of *Clark* county, to grant him the writ of *habeas corpus*, to be directed to *David W. Miller*, warden of our state prison, requiring him to have the body, &c., with the cause of his detention. He alleged in his petition that he was illegally imprisoned, &c. The writ issued. The warden produced *Snyder* before the judge, and returned, as the cause of his detention, the record of his prosecution in, and conviction and sentence by, the Court of Common Pleas of *Laporte* county, *Indiana*, upon a charge of felony, in 1854. The judge ordered the prisoner to be discharged from the state prison, and returned to the jail of *Laporte* county, to await the further action of the Courts of said county. The warden appealed to this Court.

Did the judge of the *Clark* Common Pleas err in making the order of discharge, &c.?

He had authority to issue the writ and hear the cause. 2 R. S., pp. 20 and 22, ss. 23 and 34.

Snyder, though a penitentiary-convict, had a right to apply for and obtain the writ. 2 R. S., p. 194, s. 714. And if his detention was "illegal," said section expressly required the judge to deliver him "therefrom."

His detention or imprisonment was illegal, because it was under a void judgment and sentence. That the judgment and sentence were void, necessarily follows from the fact that the Court which pronounced them had no jurisdiction of the cause in which they were declared,—a point this Court has heretofore decided. *Simington v. The State*, 5 Ind. R. 479. In *Horner v. Doe*, 1 Ind. R. 130, this Court

held, that a judgment, appearing to be rendered by a Court having no jurisdiction of the subject-matter, was a nullity, and might be so treated when it came in question collaterally. See the authorities there cited. Here the want of jurisdiction does appear, as that of the Common Pleas is conferred by statute, and we must take notice of its extent. In *Williamson v. Berry*, 8 Howard (U. S.) R. 495, the cases on this point are reviewed, and the rule is declared to be, "that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal."

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This question of jurisdiction the judge had a right to inquire into on the hearing upon *habeas corpus*, both upon general principles of law, and under our statute. The statute is (2 R. S., p. 196, s. 725) that the judge, on such hearing, when the prisoner is held "upon any process issued on any final judgment of a Court of competent jurisdiction," shall not discharge, &c., plainly implying that the question of jurisdiction is open to inquiry. See, also, 8 How., *supra*.

The judge did right, then, in discharging the petitioner from the penitentiary; but the record returned as showing the cause of his detention, showed that a complaint had been preferred against him of an act of felony; that upon that complaint he had been committed to the jail of *Laporte* county, in which said felony had been perpetrated, and that he had never been legally discharged from said imprisonment. This was a custody to which the Common Pleas, as an examining Court, had a right to commit the defendant, and from which the judge, on hearing the *habeas corpus*, had no right to discharge; for the statute enacts (2 R. S., p. 196, s. 725) that where the party is in custody, "upon a warrant issued from the Circuit Court or Court of Common Pleas, upon an indictment or information," such discharge shall not take place. In this latter case—that of the warrant—the party is held for trial, and not upon final judgment, and hence is legally in custody.

The judge, therefore, did right in refusing to discharge

Nov. Term, 1854. the petitioner from this custody, and in remanding him to the jail of *Laporte* county.

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SNYDER. Our attention has been called to the case of *Wright v. The State*, 5 Ind. R. 290, as being decisive of that now before us, but it is not even analogous.

In that case, the petitioner for the writ of *habeas corpus* was in the custody of the sheriff upon a warrant issued from the Circuit Court upon an indictment. In that custody, and by virtue of that warrant, it was the duty of said sheriff to hold his prisoner till discharged by due course of law. While the prisoner was thus in custody, he was brought before the Circuit Court, in which certain matters transpired that were claimed by the prisoner to entitle him to his release. Whether they did so entitle him or not, was a question, in the first instance, for that Court; and as it had jurisdiction of the cause in which the question arose, its decision upon it, though erroneous, was not void; and having decided that the matters did not entitle the prisoner to his discharge, (for the remanding him was such a decision), it was the duty of the officer still to retain him under the warrant upon the indictment.

Take another view of the case. Suppose *Wright* had actually made a formal motion for his discharge, or had pleaded the matters which had transpired in bar of further proceedings, and the Court had overruled his motion or plea, and proceeded to a further trial: could the ruling have been reviewed upon *habeas corpus*? Surely not; and for the reason that it would have been by a Court having complete jurisdiction to make it, and hence, however erroneous, it would not have been void, and could not have been impeached collaterally, but only reversed on appeal or writ of error.

STUART, J.—Adhering to the dissenting opinions in *Spencer v. The State*, 5 Ind. R. 41, and *Simington v. The State*, *id.* 479, viz., that the Common Pleas had jurisdiction of felonies, I cannot concur with the majority of the Court in refusing the *supersedeas*. I regard the prisoner as in the custody of the officers of the penitentiary, under the

following statutory provision, viz.: "No Court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: upon any process issued on any final judgment of a Court of competent jurisdiction," &c. 2 R. S., p. 195, second clause of section 725.

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Having been committed on process issued on the final judgment of a Court which I believe, for the reasons elsewhere given, had competent jurisdiction, judge *Lovering* had no authority to "inquire into the legality of the judgment" of the *Laporte* Common Pleas.

The discharge of some fifty or sixty prisoners out of the penitentiary, is the legitimate fruit of what I still respectfully conceive to be the erroneous ruling of the majority of the Court in the *Spencer* case, *supra*.

I am, therefore, of opinion that the *supersedeas* should be granted.

Per Curiam.—The motion for a *supersedeas* is denied, with costs.

W. T. Otto and *J. S. Davis*, for the appellant.

HOWARD v. COBB.

In a suit commenced before a justice of the peace, the general issue is in by statute and need not be pleaded, and the plaintiff is, therefore, entitled to open and close the argument of the cause.

The plaintiff took exceptions to instructions given by the Court below, but did not allude to them in his brief in the Supreme Court; and he was therefore presumed to have waived every objection to them.

ERROR to the *Decatur* Circuit Court.

PERKINS, J.—Suit by *Howard*, assignee, &c., against *Cobb*, before a justice of the peace. The cause of action

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was a promissory note, given for a shingle-machine, and the defence specially pleaded was that the note was obtained by fraud, in this, that false representations were made as to utility, value, &c. On the trial of the appeal in the Circuit Court, there was judgment for the defendant.

The plaintiff brings the case to this Court, and assigns errors as follows:

"1. The Court erred in refusing to give to the jury the instructions asked for by the plaintiff.

"2. The Court erred in overruling the motion of the plaintiff for leave to open and close," &c.

The second error is well assigned. The cause having originated before a justice of the peace, the general issue was in by law, and it was not necessary, therefore, that the defendant should formally plead it, to enable him to avail himself of rights under it.

The general issue being in, it devolved upon the plaintiff the right to open and close the case on the trial.

As to the instructions refused, the plaintiff is silent in his brief; and, hence, we presume he has waived his objection touching the refusal to give them, and ceased to insist upon it as error (1). And as the case must go back for another trial, which may present new phases of it, we shall not examine the question upon those instructions.

DAVISON, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Davis, for the plaintiff.

J. S. Scobey, for the defendant.

(1) A provision in the constitution requires that the Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon; art. 7, s. 5; but the Court have adopted the following rule: "Points not made in some of the briefs by counsel, will be considered as waived in the suit in which the briefs are filed, and may be treated accordingly." Rule 28. There is a statute, also, which requires "a specific assignment of all errors relied upon, to be entered on the transcript, in matters of law only," &c. 2 R. S. 1852, p. 161, s. 568.

LOUDEN v. DAY and Another.

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December 13.ERROR to the *Marion* Circuit Court.

DAVISON, J.—Replevin by the defendants in error against *Louden*, for a one-horse hack, worth 60 dollars. Pleas, 1. *Non detinet*; 2. *Non cepit*; 3. Property in *Louden*. Replication in denial of the third plea, and issues.

The material facts of this case are these: On the 19th of *January*, 1850, one *George Buchanan* recovered, before a justice of the peace, a judgment against *Robert Rabb* and *Peter F. Newland* for 40 dollars, with costs. Upon this judgment *Louden* became replevin bail; and to indemnify him against any liability he might incur as such bail, the hack in question was mortgaged to him by *Newland*. The mortgage stipulated that until default in the performance of its condition, *Newland* was to retain possession of the hack, unless he should attempt to sell the property or remove it from *Marion* county, with a view of depriving *Louden* of the benefit of the mortgage, in which case he, *Louden*, was to have the possession, &c. *Newland* paid 4 dollars on the judgment, and *Louden* being indebted to *Rabb* 18 dollars, executed to him a note for that sum, upon a verbal condition, not expressed in the note, that the amount thereof should remain in *Louden's* hands to be applied in payment of the judgment. He was also indebted to *Rabb* 20 dollars for work and labor, and it was agreed between them that that sum should also remain in the hands of *Louden*, to be by him applied in like manner. *Newland* sold the hack to the plaintiffs, and shortly afterwards died. Without reviving the judgment against his personal representative, an execution was issued upon it. This execution was, by *Louden's* direction, levied on the hack, which was afterwards sold to him at constable's sale; and in pursuance of that sale he took possession of it.

The record states that, upon the above evidence, the Circuit Court "found that the mortgage was fully satisfied by *Rabb* to *Louden* before the amount of the judgment was demanded of him, and before the execution was issued, or,

Nov. Term, 1854. at least, before he was called to pay the judgment or any part of it; and, therefore, the Court found for the plaintiffs upon the issues."

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We think the decision was right. When the execution issued, and while it was in the constable's hands, the hack was in the possession of the plaintiffs as their property. It follows that the execution never was a lien on the hack; the levy was void and the sale to *Louden* inoperative. Under that sale he acquired no title. He might have claimed the property under the mortgage, if it had remained unsatisfied; but the Court, sitting as a jury, has decided that "the mortgage was fully satisfied before the execution was issued," and we are not prepared to say that the decision is against the weight of evidence.

Per Curiam.—The judgment is affirmed with costs.

J. L. Ketcham and *N. B. Taylor*, for the plaintiff.

R. L. Walpole, for the defendants.

TIMMONS and Others v. TIMMONS, Administrator.

An infant can not appear or plead to an action by attorney.

An order was made for the sale of real estate of an intestate for the payment of his debts, upon the petition of the administrator. One of the defendants was a minor; but no guardian was appointed for her. The proceedings were under the R. S. 1843. *Held*, that the order was erroneous.

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ERROR to the *Tippecanoe* Court of Common Pleas.

DAVISON, J.—*Wingate Timmons*, administrator *de bonis non* of the estate of *Stephen Timmons*, deceased, filed a petition alleging, *inter alia*, that he had discovered the insufficiency of the personal assets belonging to said estate to pay the debts outstanding against it; that the intestate died seized of a tract of land (describing it) situate in *Tippecanoe* county, worth 400 dollars; and that, at his death, he left the following named heirs at law, viz., *James*,

Thomas, Abram, Henry, Jesse, and Amelia Timmons—the said *Amelia* being a minor. The petition prayed the Court to order a sale of said land in the mode prescribed by the statute, and for general relief, &c. Upon final hearing, the Court decreed in accordance with the prayer.

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The record shows that *Amelia Timmons* appeared to the petition by an attorney. This was error. "An infant can not appear or plead by attorney." 2 Johns. 192. Moreover, the act which authorized these proceedings required the Court, "before hearing such petition," to "appoint some suitable and discreet person the guardian" of such minors as might be parties, "for the sole purpose of appearing for them and taking care of their interest in the proceedings." R. S. 1843, c. 30, s. 226.

For the reason that no guardian was appointed for *Amelia Timmons*, the decree must be reversed (1).

Per Curiam.—The decree is reversed with costs.

J. Pettit and S. A. Huff, for the plaintiffs.

D. Mace and W. C. Wilson, for the defendant.

(1) As to the rule of decision where there is an attempt, in a collateral proceeding, to set aside an administrator's sale of real estate, for want of proper notice of the application to sell, see *Doe v. Harvey*, 5 Blackf. 487; *Thompson v. Doe*, 8 id. 336; *Doe v. Harvey*, 3 Ind. R. 104; *Doe v. Anderson*, 5 id. 33.

THE STATE v. DAILY.

Information, in the Court of Common Pleas, against *A.*, for retailing spirituous liquor without license. Plea, that the offence was committed before the organization of said Court and before the R. S. 1852 took effect; and that, hence, the Court had no jurisdiction thereof. Demurrer to the plea overruled, and the defendant discharged. The state prosecuted an appeal to the Supreme Court.

Held, that an appeal was maintainable.

Held, also, that the plea was sufficient.

In criminal prosecutions, error will lie on behalf of the state, in all cases, except where the defendant has had a verdict and judgment of acquittal, or has, at least, been put on trial before the Court or jury.

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APPEAL from the *Tippicanoe* Court of Common Pleas. STUART, J.—The alleged offence was retailing without license in *May*, 1852. Plea, also setting out the date of the offence, alleging that it was not cognizable in that Court, having been committed prior to its organization, and prior to the revision of 1852. Demurrer to the plea overruled, and the defendant discharged.

Neither the terms of the Common Pleas act, nor of any part of the revision of 1852 that we are aware of, give that Court any retrospective jurisdiction. On the contrary, section 3 of chapter 92, 1 R. S. 1852, expressly provides otherwise. In relation to all offences committed under the old law, the offenders are to be prosecuted as though it had not been repealed. To that extent, and for that purpose, the old law, with all its incidents, is still in force.

It is contended that the state has no right to have the errors committed against her in the Court below corrected in this Court. In support of the position, the case of *The People v. Corning*, 2 Comstock 9, is cited by counsel for *Daily*. That was an indictment for perjury, to which a demurrer was sustained. A writ of error was prosecuted by *The People* to reverse the judgment. The Court of Appeals held that after judgment for the defendant, a writ of error, in behalf of *The People*, will not lie.

This new doctrine was first announced in 1848. Up to that time the practice in *New-York* seems to have been the same as here: writs of error on behalf of *The People*, where there had not been a trial and judgment on the merits, were entertained. As late as 1846, and within a compass of two hundred pages of one of the volumes of reports, there are no less than five cases: *The People v. Paine*, 3 Denio 88, *The People v. Taylor*, *id.* 91, *The People v. Taylor*, *id.* 99, *The People v. Jackson*, *id.* 101, *The People v. Adams*, *id.* 190. Four of the opinions were delivered by the same distinguished judge (*Bronson*) who delivered the opinion of the Court in the *Corning* case. In two of the cases, the judgment of the inferior Court was reversed, and the offences charged being merely misdemeanors, the Court of Appeals gave judgment for *The People* on de-

murrer. These authorities and many others from the *New-York* reports are referred to and summarily disposed of—
 overruled—with the remark that the question had not
 before been made by counsel or considered by the Court,
 whether *The People* could properly bring error; and that
 such precedents were not of much importance.

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In support of the new position, several *American* authorities are cited; among others, *The People v. Dill*, 1 Scam. Ill. R. 257, decided in 1836. It appears that *Dill* had been indicted for selling liquor without license. He answered to the indictment, was tried and acquitted. On the trial, *The People* excepted to the ruling of the Court on a question of evidence, and after judgment of acquittal, prosecuted their writ of error. To reverse such a case, and remand it for a new trial, would be clearly in violation of the provision, believed to be common to all the state constitutions, that a party shall not be twice put in jeopardy for the same offence. On such a state of facts we are not aware of any conflict of authority. But the decision in *Scammon* is of no weight in a case like *The People v. Corning*, where the sufficiency of the indictment alone is in question. In the one case, there was a trial and acquittal; in the other, a demurrer to the indictment was sustained. It is true that in misdemeanors, if the defendant demur to the indictment, and fail, he shall not have judgment to answer over, but the decision shall operate as a conviction. 1 Chitty C. L. 442. But the *Corning* case, being a felony, is not placed on the converse of this proposition, that a judgment in his favor on demurrer shall operate as an acquittal. The broad ground is assumed, as to all criminal cases, without reference to the facts or the pleadings.

If the *Dill* case is a sample of the other authorities—
"ex uno omnes disc"—the *Corning* case must rest mainly on its own merits, and the high character of the tribunal in which it was pronounced, for its standing as an authority.

When a decision overrules a long series of cases, suddenly unsettling the established practice of years, without any very strong or urgent reason, and without the attainment of any very desirable object, its good policy, at least,

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“For nothing else but to be mended.”

Were we to follow the new doctrine of *The People v. Corning*, we should overrule a series of decisions going back, it is presumed, to the organization of the state. No case in point is to be found perhaps in the first volume of *Blackford's* reports. But it is well understood that all the cases decided during that period are not reported, but only such as seemed of importance. From 1817 to 1826, it is fair to presume from subsequent judicial history, that the state must have prosecuted writs of error in criminal cases. The first case we find reported is at the *November* term, 1826—the opinion delivered by judge *Holman*. It is *The State v. McCory*, 2 Blackf. 5, on writ of error to the *Clark Circuit Court*. The judgment against the state was affirmed. In the next case—*The State v. Miller*, 2 Blackf. 35, error to *Floyd*—the opinion is delivered by judge *Blackford*. The pleadings were similar to those in the case at bar. Plea in abatement, demurrer to the plea, and in the Court below judgment for the defendant. It was reversed and remanded for further proceedings. All through the second and subsequent volumes of the reports, a large number of similar cases occur, the last reported case being *The State v. Staker*, 3 Ind. 570. In that also the judgment was reversed and the cause remanded.

A practice thus coeval with our judicial history, applied continuously ever since, should now be regarded as the settled law of the state, not to be controlled by any authority short of a legislative enactment.

The extent to which the state is entitled to her writ of error in criminal cases, is so well understood by the profession in *Indiana*, that it is scarcely necessary to allude to it. The motion to quash, in our practice, is not easily distinguished from the demurrer *ore tenus* of the books. 1 Chitty Crim. L. 443. This motion is the usual mode adopted to test the sufficiency of the indictment. If the

Court below sustain such motion, the state is entitled to her writ of error. For the defendant had not answered to the merits—had not put himself upon the country. Sustaining the motion to quash could not be made the basis of a plea of *autrefois acquit*. To reverse and remand the case for further proceedings, therefore, does not put him in jeopardy a second time. It is only when the defendant has had a verdict and judgment of acquittal, or, at least, been put on trial before the Court or jury, that the state is denied her writ of error. *The State v. Davis*, 4 Blackf. 345, and note. Accordingly, *The State v. Burris*, 3 Texas 118.

Nor could the state except to any erroneous ruling against her in the progress of the trial. This placed the prosecuting officer too much in the power of the Court, and was felt to operate oppressively and injuriously in the administration of justice. Hence, in the revision of 1852, that inconvenience is remedied. R. S., vol. 2, p. 377.—*Id.* 381. Thus the rule which this Court has so long and so beneficially for the administration of the criminal law, held, as to the right of the state to bring error, has been sanctioned and extended by the legislature; not to effect a reversal of the particular case, but to furnish a binding and uniform rule of decision for the future.

Per Curiam.—The judgment is affirmed.

L. Reilly, for the state.

I. Naylor, *R. C. Gregory*, and *R. Jones*, for the appellee.

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The R. S. 1852 did not take effect until in May, 1853.

The provisions of article 3, of chapter 40, of the R. S. 1843, relate only to civil suits.

Courts will give a strict construction to statutes which are against common right.

A statute requiring an attorney at law or other person to render gratuitous

6	13
194	460
6	13
130	298
6	13
148	428
6	13
153	373
6	13
171	638
171	641

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services in civil cases, can not be extended by construction so as to include criminal cases.

Section 14 and the 4th clause of section 16 of chapter 59, R. S. 1843, do not continue in force section 25, p. 435, R. S. 1838.

The provision in the R. S. 1843 on the same subject of section 25, p. 435, R. S. 1838, being an independent one and containing no words of continuance in relation to the latter section, repealed it.

A statute requiring gratuitous services from the legal profession, or other particular class of citizens, in effect imposes a tax upon them, and is in violation of the requirement in the constitution which provides for a uniform and equal rate of assessment and taxation upon all citizens.

A county is liable, *ex necessitate*, for the value of the services of an attorney appointed by the Circuit Court to defend a poor person on a criminal accusation; but the Circuit Court can not fix the measure of compensation.

Wednesday,
December 13.

APPEAL from the *Tippecanoe* Court of Common Pleas.
STUART, J.—Petition for a *mandamus* against *Webb* as auditor of *Tippecanoe* county.

It appears that in *April*, 1853, *Baird* filed in the Common Pleas his petition, verified, &c., setting forth that at the *February* term, 1853, of the *Tippecanoe* Circuit Court, under the order and by the direction of the said Court, he defended one *Thomas Wickens*, then indicted for burglary, *Wickens* being then in custody and destitute of means to employ counsel in his defence; for which service the Court, at the same time, entered of record an allowance of 25 dollars, which was ordered to be certified, &c.; that a demand had been made, &c.

On this petition the Common Pleas awarded the *mandamus*.

Webb, by way of return or answer to the mandate, admits that *Baird* is a practising attorney, and also all the several matters alleged; but shows for cause why he refused to draw the warrant on the treasurer in *Baird's* favor for the 25 dollars, that the Circuit Court had no authority, under the laws of the state, to order the relator, as an attorney at law, to defend *Wickens* at the expense of *Tippecanoe* county, and to order the relator to be paid out of the treasury thereof, &c.

To this return *Baird* demurred; the Court sustained the demurrer; and ordered the rule for issuing the warrant to be made absolute. *Webb* appeals.

Something is stated in the proceedings in relation to the laws of 1852 being in force and governing the case. But this is a mistake. The service was rendered and the order made in *February*, 1853. The revised statutes did not take effect till the *May* following (1). But the new constitution was in force and the R. S. 1843.

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It will not be contended that the Court had the right to demand *Baird's* services as an attorney in defending *Wickens* as a pauper, without any reward. The 21st section, art. 1, of the constitution, provides, "that no man's particular services shall be demanded without just compensation." If sections 66, 67, 68, of chapter 40, R. S. 1843, authorizing the proper Court, in case of poor persons, to assign counsel who should defend without taking any fee or reward therefor, should be thought to conflict with this provision of the constitution, the inferior law must yield to the superior. But it is not necessary, in this part of the case, to notice such conflict, if any exists, beyond this guarded allusion. For article 3, chapter 40, *supra*, relates solely to civil suits. We are not aware of any such provision in the statutes of 1843, in relation to criminal cases. And as a statute requiring the services of the citizen gratuitously, is against common right, Courts would feel called upon to give it a strict construction. Consequently, a statute requiring gratuitous services in civil cases, would not be extended to criminal cases. We would, on this ground, seem relieved from the pressure of the act authorizing poor persons to prosecute or defend *in forma pauperis*, without fees to the attorneys or costs to the officers of Court.

It is contended in argument that section 25, R. S. 1838, p. 435, was continued in force by section 14, and the fourth clause of section 16, R. S. 1843, chapter 59. But such construction is unwarranted. The 14th section continues in force all acts regulating the fees and salaries of officers. But when the legislature has taken away the fees and salaries of officers, there is nothing to be regulated, and this continuing clause can not apply. There is also an express independent provision on the same subject in the statute

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of 1843, and no words of continuance in relation to the provisions of the code of 1838. The latter enactment is, in its main features, wholly different from the former, and therefore repeals it.

The fourth clause of the 16th section continues all acts granting any rights to individuals, corporations, &c., meaning the individuals and corporations therein specially named. It has no reference to any abstract general law, or to persons or corporations generally.

It is not readily perceived why the argument drawn from such a source should have been pressed by the plaintiff in error.

The gratuitous defence of a pauper is placed upon two grounds, viz., as an honorary duty, even as far back as the civil law; and as a statutory requirement. Honorary duties are hardly susceptible of enforcement in a Court of law. Besides, in this state, the profession of the law was never much favored by special pecuniary emoluments, save, some years ago, in the case of docket-fees in certain contingencies. The reciprocal obligations of the profession to the body politic, are slender in proportion. Under our present constitution, it is reduced to where it always should have been, a common level with all other professions and pursuits. Its practitioners have no specific fees taxed by law—no special privileges or odious discriminations in their favor. Every voter who can find business, may practice on such terms as he contracts for. The practitioner, therefore, owes no honorary services to any other citizen, or to the public. The constitution and laws of the state go upon the just presumption that the public are discriminating enough in regard to qualifications. Every man having business in Court, is presumed to be as competent to select his legal adviser as he is to select his watchmaker or carpenter. The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. And that any class should be paid for their particular services in empty honors, is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.

The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens.

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It must be matter of congratulation to the profession that they are thus relieved from the burden of gratuitous services and useless honors; and remitted to the more substantial rewards of other citizens.

In the present case, there is no controversy about the services having been rendered, or their value. The only question is, had the Circuit Court power to order them to be paid by the county of *Tippecanoe*?

The statutory provision relied upon to sustain the allowance, is, in substance, that the Court shall allow to the clerk for stationery, and to the sheriff and other persons reasonable sums for fuel and necessary articles furnished, and extra services performed, during the term of the Court.

The specific articles furnished, or services performed, for which such allowances are made, shall be entered in the book containing the proceedings of said Court. R. S. 1843, c. 38, ss. 61, 62.

These two sections confer upon the Court the discretionary power of deciding what articles and what services are necessary. They confer the further discretionary power of allowing to the persons who furnish the one, or render the other, such sums as may seem reasonable. And yet, taken in connection with the context, we should have great difficulty in saying that the terms of the act itself would include an allowance for the defence of prisoners, or that

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any such allowance was contemplated by the legislature as included.

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But that the services rendered by *Baird* were necessary to be rendered by some attorney, will scarcely admit of argument. It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defence of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.

And the only question is, who shall pay?

It is urged that ordinarily some attorney will volunteer in such cases. As well might it be urged in excuse for the neglect of the public duty to provide for the poor, that some one will voluntarily feed and clothe them.

An attorney of the Court is under no obligation, honorary or otherwise, to volunteer his services. As a matter of private duty, it devolves as much on any other citizen of equal wealth to employ counsel in the defence, as on the attorney to render service gratuitously. Nor indeed is it the duty of any private citizen to incur the expense. It is precisely like providing for the wants of the poor in other respects. The generous feelings which prompt acts of charity are admirable and ennobling to our nature. But even charity itself almost ceases to be a virtue, when they, whose duty it is to provide for the poor, make private charity a pretext for public neglect. If the state has not made provision for the defence of poor prisoners, it has presumed and trespassed unjustly upon the rights and generous feelings of the bar; levying upon that class a discriminating and unconstitutional tax. *Blythe v. The State*, 4 Ind. R. 525. It is therefore not their duty, and, under the circumstances, if no constitutional provision is made by law, no very great virtue, to encourage public neglect by gratuitous service.

Yet is the defence of the poor an imperative duty resting somewhere. We have seen that it does not devolve

upon the private citizen. It must, therefore, devolve upon the public or some portion of it. A moment's reflection would seem to fix that duty on that part of the body politic embraced in the county of *Tippecanoe*. The poor of that county are not left to the generous charity of individual citizens. They are provided for by law. A poor prisoner, as to his physical wants, falls within the reason of the law, and, to that extent, is clearly embraced in the law. If the prisoner was brought into Court not decently or comfortably clad, and was too poor to provide for himself, no one would doubt the power and duty of the Court, on general principles, without any statute, to order suitable clothes for him. It cannot be admitted for a moment that the law regards the physical wants of the citizen of more consequence than his life or his liberty. Whenever, therefore, the law makes provision for the one, at the public expense, the other, being within the reason of the law, is also embraced. It seems eminently proper and just, that the treasury of the county, which bears the expense of his support, imprisonment and trial, should also be chargeable with his defence.

But the manner in which the county treasury is to be charged, is another consideration.

On this point the decision of the Court in *Gaston v. The Board of Commissioners of Marion County*, 3 Ind. R. 497, removes the difficulty. The facts were these. The coroner called a jury to examine into the cause of death, &c. He directed Dr. *Gaston*, who was then in the employ of the county, at a given salary, to attend upon all county paupers, to make a *post mortem* examination. For this service the doctor filed his claim with the board for 25 dollars, which they refused to allow. He then sued the county board. On the liability of the county, the Court say—"We have no doubt that in a case where a *post mortem* examination is really necessary, the coroner may, by his employment, bind the county to the payment for a sufficiency of professional skill to make the examination. To that extent, at least, he must be the agent of the county." *Alleghany County v. Watt*, 3 Penn. State R. 462.

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It is admitted that there is now no statutory authority for the judge to assign counsel. *Blythe v. The State, supra*. Nor is there any statutory authority for the coroner to employ a physician. R. S. 1843, c. 56. In both cases it rests upon the necessity of such services to accomplish the ends of public justice. The judge who employs counsel, and the coroner who employs a physician, is, to that extent, the agent of the county.

But though, *ex necessitate*, the agents to employ, they are not the agents to fix the measure of compensation. That, like other cases of implied assumpsit, is to be determined by due course of law.

While the judge had the power to employ *Baird* at the expense of the county, he had not the power to settle the amount of compensation or make an allowance.

The judgment of the Common Pleas awarding a peremptory *mandamus* was, therefore, erroneous.

DAVISON, J., dissented.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. W. Chase and *J. A. Wilstach*, for the appellant.

W. F. Lane, for the appellee.

(1) The R. S. 1852 took effect on the 6th of May, 1853. *Jones v. Cavins*, 4 Ind. R. 305.—*The State v. Kiger*, *id.* 621.

RANK v. HANNA and Another.

6	20
148	660
6	20
166	420

A husband who has conveyed land in which his wife has an inchoate right of dower, can not, by any subsequent act, affect the interest of the wife.

Where a husband, being seized in fee of an undivided interest in land, conveys it to a third person, who, during the life of the husband, causes it to be set off to himself in severalty, the wife, after the husband's death, may have her dower assigned out of the whole tract, as if no partition had been made.

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December 13.

APPEAL from the *Tippecanoe* Court of Common Pleas.

HOVEY, J.—On the 8th day of March, 1853, *Elizabeth Rank* brought an action, in the Court of Common Pleas

of *Tippecanoe* county, for dower. *Hanna* and *Reynolds*, the defendants, answered, admitting that *William E. Rank*, the husband of the petitioner, was seized of one undivided eighth part of the tract of land described in the petition, and averring that they were seized in fee simple of six-eighths, and one *Clark Williams* of the remaining eighth part of said land. That *William E. Rank*, on the 19th day of *September*, 1844, conveyed his part in said land to one *Lyman Beeman*, and that *Beeman*, *Williams*, and the defendants agreed that the whole tract should be platted as an addition to the town of *Lafayette*, and that the respective owners should hold their shares in the lots in severalty; and that to carry this agreement into effect, *Williams* and *Beeman*, with their wives, on the 3d day of *November*, 1844, conveyed their interest to the defendants, who plat- ted the same, and recorded their plat embracing the tract, as *Hanna* and *Reynolds'* addition to *Lafayette*. That on the next day, the defendants conveyed to *Beeman* seven and one-half of the lots in the addition, being one-eighth of the whole number in value. That *William E. Rank* died long after all these transactions, and that no part of the lots conveyed by *Beeman* are embraced in the complaint.

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HANNA.

To this answer the plaintiff demurred, alleging as a cause that the answer does not contain sufficient facts to bar the plaintiff of her action, &c. Joinder in demurrer, demurrer overruled, and judgment in favor of the defendants.

The defendants insist that *Beeman*, by the conveyance from the plaintiff's husband, became vested with his title, and during his life could exercise all the control and power over that title that the husband could, had it remained in him. And that had this title remained in the husband, he could have made partition with his co-tenants, and the dower right of the plaintiff would have attached only to the part set off to the husband in severalty.

We will not stop to inquire what the husband might have done had he lived, nor what the consequences might be in any supposed state of facts. When a husband conveys land in which the wife has an inchoate right of dower, no act done by him subsequent to the conveyance

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can affect the interest of the wife. Dower was given by our statutes for the support and maintenance of widows, and to permit any act of the husband to lessen or injure that right would be in direct opposition to the spirit and meaning of the law. The language of the statute itself is a complete answer to the position assumed by the defendants. "No act, deed, or conveyance, performed or executed by the husband, without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law; nor any sale, disposition, transfer, or incumbrance, of the husband's property, by virtue of any decree, execution, or mortgage, to which she shall not be party, except as provided otherwise in this article, shall prejudice or extinguish the right of the wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto." R. S. 1843, p. 430, s. 95. See *McMahon v. Kimball*, 3 Blackf. 1.

The husband was seized, during coverture, of an undivided eighth part of the lands in controversy, and in that the widow is entitled to dower. It would be unreasonable and unjust to suppose that any particular mode of using the property by the vendee, could change or affect her rights.

The cases of *Matthews v. Matthews*, 1 Edwards' Ch. R. 567, and *Potter v. Wheeler*, 13 Mass. 504, cited by the defendants, have no analogy to this. In those cases the question was as to the rights of the widow in lands which had been divided by partition in the lifetime of the husband.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Newell and *E. A. Greenlee*, for the appellant.

R. C. Gregory, *R. Jones* and *S. W. Telford*, for the appellees.

HETZFIELD v. THE STATE.

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COFFELT.Wednesday,
December 13.APPEAL from the *Dearborn* Court of Common Pleas.

HOVEY, J.—Information for retailing. Plea, not guilty. Trial by the Court, and a fine assessed of 2 dollars. No motions were made. The defendant appealed.

The judgment in this case is affirmed, for the reasons given in the case of *Hornberger v. The State*, 5 Ind. R. 300.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman, for the appellant.

R. A. Riley, N. B. Taylor, and J. Coburn, for the state.

BISCHOF v. COFFELT.

6b	28
141	277
6b	23
152	131

In a suit against the maker of notes given for the price of goods, the defendant having offered evidence of fraudulent representations made to him by the payee concerning the goods at the time of the purchase, offered further to prove a series of sales made by the payee to other persons, in other places, by the same sort of falsehood and misrepresentations; but it was not pretended that the defendant, at the time of his purchase, had any knowledge of the other sales, or was influenced by them. *Held*, that the evidence was irrelevant.

If, in a civil case, the representations of one party, being calculated to inspire confidence, are confided in and acted upon by another as true, when they are really false, and the latter is thereby induced to enter into a contract which otherwise he would not have made, the law regards the transaction as fraudulent and void, without reference to the motive of the party who induced the fraud.

A verdict supported by competent evidence will not be disturbed on account of erroneous instructions or the admission of irrelevant evidence.

The assignee of a note given for the price of goods can not, a recovery on the note being defeated, recover the value of the goods under the common counts.

ERROR to the *Greene* Circuit Court.Thursday,
December 14.

STUART, J.—Assumpsit by *Bischof*, assignee of one *Billingheimer*, against *Coffelt*, on two promissory notes. Plea,

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the general issue, under oath. Verdict and judgment for *Coffelt*. The evidence is all properly in the record; and *Bischof* brings the case on error to this Court.

The evidence adduced under the general issue, goes to impeach the consideration of the note.

It appears that *Bischof* and *Billingheimer* were peddling broadcloths and other articles, through the western counties of the state. They offered the broadcloth at the low price of 2 dollars per yard, representing it to be *French* cloth, worth 7 dollars per yard, and naming several persons in *Greencastle* who had purchased from them, and sold at 7 dollars, and even a "higher figure." *Coffelt*, who was wholly ignorant of the value and quality of such goods, excited by these representations, bought largely of the supposed *French* broadcloth, and gave the notes now in suit for the purchase-money. It also appears in evidence, that the goods were not *French* broadcloth, but a very inferior article of *English* or *American* manufacture, of little value.

In further support of this part of the defence, *Coffelt* offered to give in evidence a series of fraudulent sales made by *Bischof* and *Billingheimer* to other persons, in different parts of that and the adjoining counties, effected by the same sort of falsehood and misrepresentation. It was not pretended, however, that, at the time of his purchase, *Coffelt* had any knowledge of these other sales, or that he was in any manner influenced by them. To the introduction of this evidence *Bischof* objected; but the Court overruled the objection, and permitted these independent transactions to go to the jury. This ruling of the Court was excepted to, and is one of the errors assigned.

The position is sought to be sustained in argument, by its analogy to the course of evidence in forgery. It is argued that the state is permitted to prove the particular case made in the indictment, and then to give evidence of other utterings of similar false instruments about the same time, to show the guilty knowledge and felonious intent. It is urged that the independent transactions here offered in evidence were admissible for the same reason, to answer a similar end.

But we think the argument unsound. The object of inquiry in civil cases is entirely different from that in criminal cases. In the latter, facts are used chiefly as *indices* to the motives of the actor. The criminal law does not punish for the act done alone, but for the motive or intent with which it is done. Hence facts are made the means of exploring the intent. But in civil cases it is different. The facts themselves give character to the transaction. The motives of the actors are comparatively immaterial. If the representations of one party, in a case where such representations are calculated to inspire confidence, are confided in and acted upon by another as true, when in reality they are false, and thereby the latter is induced to enter into a contract which otherwise he would not have made, the law will declare the transaction fraudulent and void, without reference to the motive of the party inducing the fraud. It is sufficient, in civil cases, that a fraud has been committed, by means adequate to deceive. That fact, without the motive, furnishes all the elements essential for the law to operate upon.

Hence, in the case at bar, the independent sales, without the knowledge of *Coffelt*, however fraudulent they might be, could not, giving the argument its full latitude, go further than to point the fraudulent motive of the vendor. And as the motive was immaterial, the evidence was at least irrelevant. But it was more. Its tendency was to bias the jury in weighing the facts before them. We are, therefore, of opinion that the objection to its admission was well taken.

The second branch of the defence is the general issue under oath. There is evidence going to show that the maker of the notes could not read, that at the time of the execution the notes were only partially read, in one instance, and falsely read, as to amount, in the other. This, of itself, was sufficient to support the verdict in favor of the defendant. So that the errors of the Court in the admission of evidence or in the instructions to the jury are wholly immaterial.

Had the payee of the notes been the plaintiff, he might

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Nov. Term, 1854. have recovered the real value of the cloth under the common count. But *Bischof* is only assignee.

BISCHOF *Per Curiam*.—The judgment is affirmed with costs.
v.
LUCAS. *J. P. Usher*, for the plaintiff.
G. G. Dunn, for the defendant.

BISCHOF v. LUCAS.

In a suit by the assignee against the maker of a note, given for the price of goods sold to the defendant under false and fraudulent representations, the latter, if he did not return or offer to return the goods in a reasonable time, is liable for their value.

A person who not being a judge of an article himself, nor professing to be, purchases it, confiding in the representations of the seller as to its quality, and gives a note for the price, may show, in an action upon the note, the inferior quality of the article, in order to reduce the recovery.

A payment made upon a note after suit brought, is admissible in evidence to reduce the damages.

Thursday,
December 14.

ERROR to the *Greene* Circuit Court.

STUART, J.—This case is similar to the preceding one of *Bischof v. Coffelt*, *ante*, p. 23. Here, however, the general issue is not sworn to. Trial by the Court. Finding and judgment for the defendant, *Lucas*.

The evidence is all properly in the record, which, by agreement, is composed partly of the evidence given to the jury in the other case.

The note sued upon was given to *Billingheimer*, for a parcel of the "*French* broadcloth" spoken of in the *Coffelt* case. A series of similar misrepresentations were made as to the character and value of the cloth.

The same kind of evidence in relation to other sales made to other persons, but of which *Lucas* in this case, like *Coffelt* in the former, had no knowledge, was permitted to be given. Of course these transactions had no influ-

ence on the purchaser. For the reasons given in the preceding case, it was error to admit them.

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The only other new element in this case to distinguish it from that, is the introduction of evidence to show that, after suit brought, the defendant had paid 40 dollars or so. This matter we conceive stands thus. The defendant having kept the cloth, neither returning nor offering to return it in a reasonable time, was bound to pay for it. In defence he could show a partial failure of consideration, on account of the inferior quality of the cloth. This defence grew out of the fact that, not being a judge of the article himself and not pretending to be, he confided in the representations of the payee of the note. He was, however, liable to the assignee for whatever the cloth was worth. If after suit brought he had paid the note or any part of it, he had a right to show that fact, not in bar, but in mitigation of damages. In the case of *The Bank v. Brackett*, 4 N. H. 557, the course of decision on this point is fully investigated, and it is held that payment after suit brought is admissible in evidence to reduce the damages. Numerous decisions are there cited to that effect.

BISCHOF
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LUCAS.

In *Bischof v. Coffelt*, the evidence in relation to the execution of the note warranted the jury in finding a verdict for the defendant. And the note being out of the way, the assignee could not recover on the common counts for the value of the cloth.

Here the note is valid, subject only to the effect of a defence of partial failure of consideration. On the former, the evidence erroneously introduced could have had no influence. The verdict was right independent of it. On the latter the tendency was to mislead, and to excite prejudice.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. P. Usher, for the plaintiff.

G. G. Dunn, for the defendant.

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DUNCAN and Others v. DUNCAN and Others.

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v.
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The act approved *January 12, 1850*, allowing causes which originated in the Probate Courts to be taken by appeal or writ of error from the Circuit Courts to the Supreme Court, was repealed by the act creating the Court of Common Pleas.

Thursday,
December 14.

ERROR to the *Fountain* Circuit Court.

Per Curiam.—Bill in chancery, filed in the Probate Court of *Fountain* county, by the defendants in error against the plaintiffs. The object of the suit was to contest the validity of a certain instrument, purporting to be the last will of one *Joshua Duncan*, deceased. The defendants below answered the bill; whereupon the Court directed an issue of *devisavit vel non*. That issue was submitted to a jury, and a verdict was given for the complainants. A decree was rendered in accordance with the verdict. The defendants below removed the cause, by writ of error, to the *Fountain* Circuit Court, which Court affirmed said decree. The record before us was issued on the 10th of *November, 1852*, and filed here on the 8th of *April, 1853*. It is contended that this Court has no jurisdiction of the case.

An act approved *January 12, 1850*, allowed causes which originated in the Probate Courts, to be taken by appeal or writ of error from the Circuit Courts to the Supreme Court. Acts of 1850, p. 65. But when this record was issued and filed, the Probate Court was not in existence, nor was the act just cited in force. That Court had been superseded by a statute which was published and circulated throughout the state prior to the 1st day of *October, 1852*, entitled "An act to establish Courts of Common Pleas," &c. The latter act contains these provisions: Section 13. "An appeal shall lie from such Court of Common Pleas, in all cases, to the Circuit or Supreme Court, at the option of the party applying therefor." Section 43. "All laws and parts of laws contravening the provisions of this act, are hereby repealed from and after the 1st day of *October, 1852*." 2 R. S. 1852, pp. 18, 23. The above-quoted act of 1850 evidently contravened the former section, and was,

therefore, repealed by the latter section. There was, then, at the time the present record was issued, and this case brought here, no law authorizing causes which originated in the Probate Court or Court of Common Pleas to be taken by appeal, or writ of error, from the Circuit to the Supreme Court. In support of this view, there are two adjudications of this Court upon a statutory provision similar to the above-recited 13th section. *Brownlee v. Whitesides*, 8 Blackf. 80.—*Gore v. Gore*, 2 Ind. R. 55.

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1854.

EBERT
v.
LUDLOW.

The writ of error is dismissed with costs.

D. Newell, for the plaintiffs.

R. A. Chandler, for the defendants.

EBERT and Another v. LUDLOW.

If from the judgment of a justice of the peace against two defendants, one of them appealed to the Circuit Court, before the R. S. 1852 were in force, in his own name, without joining the other, the appeal could be dismissed on motion.

APPEAL from the *Dearborn* Circuit Court.

Thursday,
December 14.

DAVISON, J.—*Ludlow* recovered a judgment against *Ebert* and *Martin* before a justice of the peace, from which *Ebert* appealed; and on the 29th of *July*, 1852, the justice's transcript, with the appeal bond and certain other papers in the cause, was filed in the Circuit Court. The plaintiff moved to dismiss the appeal on the ground that it was not taken by and in the name of both defendants. The Court sustained the motion, and the appeal was accordingly dismissed.

The Court ruled correctly. In *Kain v. Gradon*, 6 Blackf. 138, it was held that "if from the judgment of a justice of the peace against several defendants, some of them appeal to the Circuit Court in their own names, without joining

Nov. Term, 1854. the others, the appeal should be dismissed on motion" (1).
 The judgment of the Circuit Court must be affirmed.
 WINEHART v. THE STATE. *Per Curiam*.—The judgment is affirmed with costs.
J. T. Brown, for the appellants.
J. Ryman, for the defendant.

(1) The R. S. 1852, in relation to appeals from justices' judgments, provide that when there are two or more plaintiffs or defendants, one or more of such plaintiffs or defendants may appeal, without joining the others in such appeal. 2 R. S. 1852, p. 461, s. 64.

WINEHART v. THE STATE.

Ignorance of the law will not excuse a man from punishment on a criminal accusation.

Thursday,
 December 14.

APPEAL from the *Putnam* Circuit Court.

PERKINS, J.—Indictment for keeping a gaming house. Conviction and fine in the Circuit Court.

The question is on the weight of evidence. It is proved that the defendant kept a grocery store, in which he sold beer, cigars, &c.; and two witnesses testified that they had often played cards in an adjoining room in the house, for cigars, beer, &c.; that the defendant did not know it was wrong to permit such acts in his house, and whenever he learned it was so, he forbade them. Such prohibition is sometimes a trick. Besides, his ignorance of the law did not excuse him. We think a jury might infer the guilt of the defendant from the evidence. See *McAlpin v. The State*, 3 Ind. R. 567.—*The State v. Staker*, *id.* 570.

Per Curiam.—The judgment is affirmed with costs.

J. Cowgill and *D. R. Eckles*, for the appellant.

R. A. Riley, *N. B. Taylor*, and *J. Coburn*, for the state.

ROGERS, Administrator, v. THE STATE.

Nov. Term,
1854.ROGERS
v.
THE STATE.

Section 109, 2 R. S. 1852, p. 273, was not intended to give to the mortgage creditor a general lien against the estate of the mortgagor but to continue the mortgage, as to the mortgaged property, after the mortgagor's decease. Where the mortgagor was not seized of the property at the time of his death, the mortgagee has his choice, of following the property, or resorting to the estate for payment; but, in such case, if he seek payment from the estate, his claim will be classed with the "general debts."

Section 9, pp. 51, 52, of the acts of 1853, which professes to amend section 109, p. 273, 2 R. S. 1852, is unconstitutional, for not setting forth the latter section at full length.

APPEAL from the *Allen* Court of Common Pleas.

Thursday,
December 14.

HOVEY, J.—In *April*, 1840, *Absalom Holcomb* borrowed of the agent of the surplus revenue fund of *Allen* county, the sum of 200 dollars, and executed a mortgage on a certain tract of land to secure the payment. *Holcomb* died intestate and insolvent, and *Rogers* was appointed his administrator. At the *January* term, 1854, of the Court of Common Pleas of *Allen* county, the state, by her attorney, filed a petition showing the above facts, and prayed an order for the payment of her debt in full out of *Holcomb's* estate. The administrator answered the petition, and set up a sale and conveyance of the land in fee simple by *Holcomb* in his lifetime, and averred that at the time of his death, *Holcomb* had no interest or title in said land. The answer was demurred to, demurrer sustained, and an order made that the administrator should pay the amount of the claim in full. The petition and answer are both very defectively drawn, but we suppose the principal question in controversy is the construction of section 109, 2 R. S. 1852, p. 273, which provides that—

"All claims against the estate of a decedent shall be paid in the following order: First. Expenses of administration. Second. Expenses of last sickness, and funeral expenses. Third. Judgments which are liens upon the decedent's real estate, and mortgages of real and personal property existing in his lifetime. Fourth. General Debts. Fifth. To legatees. Sixth. To distributees."

It was not the intention of the general assembly, in

Nov. Term, 1854.
HORNBERGER
 v.
THE STATE.

enacting this section, to give the mortgage creditor a general lien against the estate, but to continue the mortgage as to the property after the mortgagor's decease. In cases where the mortgagor was not seized of the property at the time of his death, the mortgagee has his choice, of following the property, or resorting to the estate for payment; but in such case, if he seek payment from the estate, his claim will be classed with the "general debts."

Section 9, pp. 51, 52 of the acts of 1853, which purports to amend section 109, *supra*, is unconstitutional, as the act containing said section 9, does not set forth section 109 at full length. Constitution, art. 4, sec. 21. See, also, *Langdon v. Applegate*, 5 Ind. R. 327.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

R. Brackenridge, Jr., for the appellant.

HORNBERGER v. THE STATE.

Thursday,
 December 14.

APPEAL from the *Dearborn* Court of Common Pleas. Hovey, J.—At the *June* term of the Court of Common Pleas of *Dearborn* county, an information was filed against *Hornberger* for retailing without license. The information is in the usual form, except that there is no averment that the liquor sold was of any value. The defendant pleaded not guilty, was tried by the Court, and fined 4 dollars. There is no motion to quash—no motion for a new trial or in arrest of judgment.

For the reasons given in a case between the same parties decided at this term (1), the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman, for the appellant.

R. A. Riley, N. B. Taylor and J. Coburn, for the state.

(1) See 5 Ind. R. 300.

KIRBY and Another v. HOLMES and Wife.

Nov. Term,
1854.KIRBY
v.
HOLMES.

On the reversal of a cause in the Supreme Court and its having been remanded to the Court below for further proceedings, it was not necessary, under the R. S. 1843, that the defendants should again be summoned.

The omission to default infant defendants who fail to appear, and to take judgment against them for want of a plea, is merely a defect in form, and can not be assigned for error.

A defendant, while he has a plea in bar on file, can not be defaulted.

If, in a proceeding to obtain an assignment of dower and for damages for withholding it, the defendants, having pleaded in bar, on being called, fail to appear, the plaintiff can have the damages assessed in the same manner as if the defendants had appeared and defended.

If a judgment is rendered in form against "the defendants," it will be presumed to be against all of them.

In an appeal to the Supreme Court, under the R. S. 1843, in the case of several defendants, all were required to join, or, on the refusal of any to do so, they were required to be summoned and severed.

APPEAL from the *Decatur* Circuit Court.Friday,
December 15.

This was a petition in the Probate Court of *Decatur* county, filed by *Holmes* and wife against *Bradley Adkins*, and the heirs at law of *Martin Adkins*, deceased, some of whom were minors. The suit was for dower on behalf of the female plaintiff, who was the lawful wife of said *Martin* at the time of his death, and had since married the other plaintiff. The petition also claimed damages for the withholding of the dower. The Probate Court gave judgment against the heirs for dower, and also for damages for withholding the dower. The defendants took an appeal to the Supreme Court, which Court reversed the judgment of the Probate Court in respect to the damages, (on the ground that they had been allowed for too long a period), and having affirmed the residue of the judgment, remanded the cause, &c. The case was transferred to the Court of Common Pleas, by virtue of the statute providing for the transfer of the business pending in the Probate Courts to the Courts of Common Pleas.

STUART, J.—The main facts of this case will be found in the opinion delivered when it was here on appeal from the *Decatur* Probate Court, *May* term, 1850. 2 Ind. R. 197.

Nov. Term,
1854.

KIRBY
v.
HOLMES.

In the Probate Court the parties all appeared to the suit. After it was reversed and remanded for a new assessment of damages, the Common Pleas issued process for the defendants. But this was superfluous. The parties were still in Court as they stood at the time the damages were erroneously assessed. The statute pointing out when a cause reversed and remanded shall stand for trial, does not seem susceptible of any other construction. R. S. 1843, p. 732, s. 321.

At the re-assessment of damages, the record notices the appearance by attorney of the appellants, *Kirby* and *Stewart*, but is silent as to the other defendants. The omission to default the infant defendants, and take judgment against them for want of a plea, is a mere defect in form, and can not be assigned for error. 2 Ind. R. 197.

As to the adult defendants there was a plea in bar filed and issue joined. They could not be defaulted. Whether they were called and failed to appear is not shown. In such case the plaintiffs could assess the damages in the same manner as if the defendants had all appeared and defended the cause. *Harris v. The Muskingum Manufacturing Company*, 4 Blackf. 267, and the authorities cited. And the judgment against the "defendants" will be presumed to be against all the defendants in the cause.

We think the jury was impaneled substantially in accordance with the second clause of section 17, of chapter 39, R. S. 1843.

The appeal is taken by *Kirby* and *Stewart* alone. All the defendants should have joined, or there should have been a summons and severance. *Kain v. Gradon*, 6 Blackf. 138 (1). The appeal must be dismissed.

Per Curiam.—The appeal is dismissed with costs.

J. S. Scobey, for the appellants.

J. Ryman, for the appellees.

(1) The provision in the R. S. 1852 in relation to the parties to appeals, is as follows:

"A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the Supreme Court. Unless they appear, and decline to

join, they shall be regarded as having joined, and shall be liable for their due proportion of the costs. If they decline to join, their names may be struck out, on motion, and they shall not take an appeal afterwards, nor shall they derive any benefit from the appeal, unless from the necessity of the case, except persons under legal disabilities." 2 R. S. 1852, p. 158, s. 551.

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1854.

POYSER
v.
MURRAY.

POYSER v. MURRAY.

In a suit commenced before a justice of the peace, the want of jurisdiction can be shown either before the justice or on appeal to the Circuit Court.

The refusal of the only justice of the peace of the proper township to entertain a suit, where he was legally competent and disinterested, did not, by the R. S. 1843, authorize the plaintiff to bring the suit in another township.

The remedy of the plaintiff, on such refusal, was by suit against the justice.

ERROR to the *Lagrange* Circuit Court.

Friday,
December 15.

STUART, J.—*Murray* sued *Poyser* before a justice of the peace, and had judgment. The case was appealed to the Circuit Court, and there was judgment for the plaintiff there also. *Poyser* prosecutes error.

There is no brief for *Murray*.

Counsel for *Poyser* insists that the Court had no jurisdiction, because the defendant was sued out of his township. There was another point argued, which it is not material to notice.

The facts, as shown on the trial in the Circuit Court, were, that *Poyser* lived in *Eden* township; that there was at the time in said township a justice of the peace acting, &c., not related, &c., and competent to try the cause, &c. It was further shown that the trial was had before a justice of the peace in *Newberry* township. *Murray* showed in defence that he had applied to the *Eden* township justice for a summons, who told him he did not wish to act, and advised him to settle it, and that he intended to resign

Nov. Term, 1854. in a few days, which he did about eighteen days after the suit was commenced.

BATES
v.
BULLA.

The Court entertained jurisdiction and tried the cause.

The want of jurisdiction may be shown, in such cases, either before the justice or on appeal to the Circuit Court. *Thomas v. Winters*, 4 Blackf. 161.—*Perkins v. Smith*, *id.* 299. That the justice of the proper township declined to act, is the reason here given why the suit was brought in another township. It is not among the causes pointed out in the statute. R. S. 1843, p. 863. The Court have had some difficulty in coming to a conclusion whether the facts do not bring this case within the reason of the exceptions, and that therefore it is embraced within the provisions of the 4th section of chapter 47, R. S., *supra*. But a majority of the Court are in favor of holding the exceptions allowing parties to sue out of the township strictly; leaving *Murray* to his remedy against the magistrate.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Ellison, for the plaintiff



BATES and Another v. BULLA.

Friday,
December 15.

6	36
137	63
6	36
147	699

APPEAL from the *Carroll* Court of Common Pleas.

Per Curiam.—Application for a *ne exeat* and injunction. Writ awarded. Motion to dissolve overruled, and appeal to this Court. No brief is filed. The case, of course, stands for answer. The decree is affirmed with costs.

All points not made by brief may be treated as waived (1).

(1) See note to *Howard v. Cobb*, *ante*, p. 5.

THE STATE *v.* SMITH.Nov. Term,
1854.THE STATE
v.
CARTER.APPEAL from the *Marion* Circuit Court.

Per Curiam.—The judgment in this case is reversed, upon the authority of, and for the reasons given in, *Lawrie v. The State*, 5 Ind. R. 525, the question arising in the record of each case being the same. See, also, *Lichtenstein v. The State*, *id.* 162.

Friday,
December 15.

The judgment is reversed with costs. Cause remanded, &c.

R. A. Riley, N. B. Taylor, and J. Coburn, for the state.

TEHAN and Others *v.* THE STATE.APPEAL from the *Lawrence* Court of Common Pleas.Friday,
December 15.

Per Curiam.—The judgment in this case is reversed, for the reasons given in *Spencer v. The State*, 5 Ind. R. 41, and in *Simington v. The State*, *id.* 479, the questions arising in the record of each case being the same.

G. G. Dunn, for the appellant.

R. A. Riley, N. B. Taylor, and J. Coburn, for the state.

THE STATE on the relation of SPRAGUE and Others *v.*
CARTER.

A justice of the peace, under the R. S. 1843, could render a valid judgment against a defendant sued out of his proper township, if such defendant, having been served with process, did not appear and plead to the jurisdiction.

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THE STATE
v.
CARTER.

In a suit on the bond of a justice of the peace for his refusal to account for money collected, it appeared that he had officially received a note for collection from the relators, had collected it, and refused to account for the proceeds. *Held*, that it must be presumed, *prima facie*, against him and his sureties, that he had the right to give the receipt officially, and that his act was legal.

Friday,
December 15.

ERROR to the *Hendricks* Circuit Court.

HOVEY, J.—Debt on a justice's bond against *James Dugan* and *Carter*. *Dugan* was not found. There are several breaches in the declaration, to some of which demurrers were filed and sustained; but as the issues upon which the case was tried fully embrace the subject-matter in controversy, it is deemed useless to pass any opinion upon the pleadings.

The facts, as shown by the bill of exceptions, are as follows:

Dugan, as justice of the peace of *Centre* township, in *Hendricks* county, received a note of *A. W. Sprague & Co.*, for which he executed and delivered the following receipt:

"Received of *A. W. Sprague & Co.* a note drawn by *Benjamin Davis* for 22 dollars and 50 cents, dated *May 20th, 1845*, at ten days' sight. *Danville, February 26th, 1846.* *James Dugan, J. P.*"

Dugan collected the note in 1846, without suit. It is admitted that *Davis* was not at any time a resident of *Centre* township, but that he resided in *Brown* township, in said county. *Sprague & Co.* demanded the amount collected, but *Dugan* failed to pay. There is also included in the declaration a claim of 3 dollars and 19 cents, about which there is no controversy, and for which judgment was rendered for the plaintiff below.

The only question is, whether *Carter*, as surety on the bond, is liable for the amount of the note collected?

It is contended that the justice of the peace would have had no jurisdiction in a suit on the note, as the payor did not reside in *Centre* township.

This position can not be sustained. The 4th section, R. S. 1843, p. 863, does not necessarily destroy the jurisdiction of justices of the peace in cases like this. The

defendant is not compelled to answer out of his township except in certain cases specified in that section; but unless he appear and plead to the jurisdiction after being duly served with process, the justice would have the power to render judgment against him. As *Dugan* receipted for the note as justice of the peace, it will be presumed against him and his surety that he had the power to give the receipt as such, and that his act was legal, until the contrary is shown. There may have been no justice of the peace in *Brown* township capable of trying the cause, and, if not, he would have had jurisdiction.

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1854.

CORY
v.
SILCOX.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave, for the state.

J. S. Harvey and *J. M. Gregg*, for the defendant.

CORY v. SILCOX.

The plaintiff, in a suit for the backing of water by a dam upon his machinery, &c., was allowed to read extracts from "Evans' Millwright Guide," in his closing argument to the jury, although the defendant objected. The Court instructed the jury that extracts read from a scientific work were not even *prima facie* of authority, but like the argument of counsel, or other thing adduced to illustrate, they might be satisfactory to the jury or they might not. *Held*, that there was no error.

In a cause where several issues of fact were raised by the pleadings, the Court, in its charge to the jury, stated that there were but two questions, specifying them, for their consideration, the other facts not being controverted. The evidence not having been set out in the record, *held*, that the presumption was that the parties had narrowed the issue to the questions stated by the Court.

Where an individual constructs a dam so as to flow back water upon the land of another, it is a presumption of law that the act is a damage, and no special damage need be proved.

This presumption applies, in this state, as well to mill-dams as others.

An obstruction caused by the back flowage from a dam, need not be continuous to authorise an action.

Nov. Term, 1854. Case by *A.* against *B.* for erecting a dam on *Blue* river below the plaintiff's mills, whereby the water was backed on his machinery. Plea, the general issue. On the trial (in *March*, 1850,) *C.*, who, prior to the commencement of the suit, had no interest in the mills, but had since acquired an interest in the profits by way of compensation for carrying on the business, was offered as a witness. *Held*, that he was incompetent.

CORY
v.
SILCOX.

Friday,
December 15.

APPEAL from the *Shelby* Circuit Court.

HOVEY, J.—Case by *Silcox* against *Cory*. Plea, the general issue. Trial by jury, and verdict and judgment for the plaintiff. The declaration alleges, that *Cory* erected a mill-dam on *Blue* river, below *Silcox's* mills, whereby the water was backed on *Silcox's* machinery, &c. A similar action between the same parties, from the *Johnson* Circuit Court, was decided at the present term. 5 Ind. R. 370.

The record contains several bills of exceptions, and four points are made in argument by the counsel for the appellants.

1. *Silcox's* counsel, in the closing argument to the jury, read from "*Evans' Millwright Guide*." This was objected to on the part of *Cory*, 1st, because there was no evidence showing that it was a work of good repute; 2dly, because it was proved that the work was not in good standing and repute; 3dly, that even if the evidence showed it to be a work of good repute, it could not be read in evidence.

There is nothing in these objections, especially as the Court charged the jury, that "the extracts read from a scientific work, are not of authority conclusively or *prima facie*. Like argument of counsel, or any other thing adduced to illustrate, they may be satisfactory to the jury or they may not." Reason is neither more nor less than reason, because it happens to be read from a book; and we think we would be adopting a very difficult rule to enforce, if we should attempt to compel counsel to use their own arguments for every position they might assume.

2. The Court, in delivering the charge to the jury, gave the following instructions:

"There are but two questions to which your inquiry will be directed, the other facts not being controverted. The first of these questions is, whether between the first day of

January, 1849, and the first day of *September*, 1849, the dam of the defendant occasioned the water of *Blue* river to so rise as to retard the operation of the plaintiff's mill in any degree for said time, or any part thereof, even for a day or hour. If so, the plaintiff is entitled to a verdict for damages to the amount of the injury suffered on that account. The second question is, whether the said dam of defendant, between said dates, caused the water of said river to so rise as to overflow the plaintiff's land any perceptible distance, so as to increase the depth of said river, where the plaintiff owned the bed thereof, for all or any day of said time. If so, the plaintiff is entitled to a verdict for the damages done; and if the damage is so small that it can not be estimated, the plaintiff is entitled to technical or nominal damages."

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1854.

CORY
V.
SILCOX.

Counsel for the appellant insist that these instructions are erroneous, first, because the pleadings present more than two questions for the consideration of the jury. As all of the evidence is not in the record, we can not decide what facts were controverted on the trial, but must presume, as the record does not show the contrary, that the parties narrowed the issues by agreement to the two questions propounded to the jury by the Court.

It is objected, also, that the Court erred in charging the jury that they might assess nominal damages; and it is contended that there must be actual and perceptible damages to sustain actions of this character. Without particularly reviewing the various cases cited which bear upon this question, we will simply refer to several elementary works of standing, where the cases may be found, being satisfied that their conclusions are sustained by the authorities.

Chancellor *Kent*, in the 3d vol. of his Commentaries, p. 439, says: "No proprietor has a right to use the water of a running stream to the prejudice of other proprietors above or below him, unless he has a prior right to divert it or a title to some exclusive enjoyment. Without the consent of the adjoining proprietors, he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below; nor throw the water

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SILCOX.

back upon the proprietor above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it."

In *Angell on Water Courses*, section 430, it is said: "Where an individual constructs a dam so as to flow back water upon the land of another, it is a presumption of law that the act is a damage, and no special damage need be proved to sustain the suit." And in section 428 he says: "Assuming that no actual damage is shown to arise from the diversion of a water-course, or of throwing water back upon the land above, an action may be maintained, on the ground that an undisturbed enjoyment or continuation of such acts, without the express consent of the owner of the land, would ripen into evidence of a right to do them." See, also, *Sedgwick on Damages*, pages 50, 136, 137. It is contended that these principles are not applicable to dams erected for milling purposes in this state, as mills have been especially favored by our legislation. It is true that one of the principal objects which our legislators have had in view in enacting our acts of *ad quod damnum* was to foster and build up manufacturing establishments; but there can be no doubt that they also intended to establish an easy and cheap mode of quieting and settling the conflicting and ever-varying questions which arise out of riparian interests. Had *Cory* resorted to those acts for the purpose of establishing his dam, much expense and litigation would, no doubt, have been avoided. As it is, he must abide by the principles of the common law.

Again, it is said these instructions are erroneous because the Court instructed the jury that the plaintiff should recover, if the evidence showed that his machinery was retarded a day or an hour; and the position is assumed, that such obstructions must be proven to be continuous to enable him to recover. In cases like this, no such rule prevails. One hour's obstruction would furnish as complete a cause of action as any other longer period of time. There may be cases when dams have been legally established, where temporary obstructions, caused by floods or

accidents, would furnish no cause of complaint, but we will not presume that such facts were proven, where the record is silent.

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3. After *Silcox's* and two of *Cory's* witnesses had been examined, the Court, on motion of *Silcox's* attorney, ordered *Cory's* witnesses to be separated. This was a matter within the discretion of the Court, and the record does not show that that discretion was abused.

4. *Aaron Brandenburg* was called as a witness on behalf of *Silcox*, and sworn in chief. Before his examination, the Court permitted *Cory's* counsel to examine him touching his interest in *Silcox's* mills. He answered, that previous to the commencement of this suit, he had no interest whatever in said mills, but that since the middle of *September*, 1849, he had been carrying on the business of said mills under a contract for part of the profits, which was to continue until *May*, 1851.

Cory objected to his being examined in chief, and the objection was overruled.

In the former cause we decided that *Brandenburg* was incompetent, first, because, as shown by the facts in that case, he would be entitled to a part of the damages under his contract with *Silcox*; and, secondly, because the record of the judgment obtained would be admissible in a subsequent suit by *Silcox* and himself against *Cory*. The same interest in the record is presented in this cause. In the case of *Blakemore and Booker v. The Glamorganshire Canal Company*, 2 Crompt., Mees. & Roscoe R. 133, an action was brought for diverting water. On the trial, the record of a former suit between *Blakemore* and the company was offered in evidence, and it was objected that as *Booker* was not a party to that record, and as he had been examined as a witness on the former trial, the record was not admissible; but the Court, after reviewing the authorities, were unanimously of opinion that the record was properly admitted, on the ground that it was within the rule of verdicts being admissible between parties and privies. See 1 Greenleaf's Ev., sec. 536. As the record could be used by *Brandenburg* and *Silcox* against *Cory* for obstructions

Nov. Term, 1854. which might occur during *Brandenburgh's* term in the mills, he was incompetent, and should have been excluded, under the law as it existed at the time of the trial (1).
 CRANE v. HOPKINS. See *Cory v. Silcox*, 5 Ind. R. 370.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Morrison, S. Major, W. J. Peaslee and T. A. Hendricks, for the appellant.

H. O'Neal, T. D. Walpole and M. M. Ray, for the appellee.

(1) The trial was in *March*, 1850. The R. S. 1852 provide that—"No person offered as a witness shall be excluded from giving evidence either in person or by deposition, in any judicial proceeding, by reason of incapacity from crime or interest. But this section shall not render competent a party to an action, or the person for whose use it is brought, or the husband or wife of any such party." 2 R. S. 1852, p. 80, s. 238.

CRANE and Another, Executors, v. HOPKINS.

Petition for the allowance of a claim against a testator's estate. Answer by the executors denying the validity of the claim. Trial, and judgment for the claimant, and for costs against the executors *de bonis propriis*. The entry was afterwards amended so as to provide that the costs should be levied out of the assets of the testator in the hands of the executors to be administered, if he had so much, but if he had not, then to be levied out of the executors' own goods.

Held, that the judgment for costs, as first entered, was erroneous.

Held, also, that the judgment for costs, as amended, was proper.

Saturday,
December 16.

APPEAL from the *St. Joseph* Probate Court.

This was a petition filed by the appellee in the *St. Joseph* Probate Court for the allowance of a claim against the estate of *John Gilmore*, deceased, of whose will the appellants are executors. There was an answer in denial of the validity of the claim, trial by jury, and verdict and judgment for the claimant. By the transcript of the record, as originally certified to the Supreme Court, it appeared that judgment had been rendered for costs against

the executors *de bonis propriis*, but by an amendment of the record, afterwards certified to the Supreme Court in pursuance of a *certiorari*, it appeared that judgment had been rendered for the costs, to be levied out of the assets of the testator in their hands to be administered, if the defendants had so much, but if they had not so much in their hands, then the costs were to be levied of the appellants' own goods.

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1854.

CRANE
v.
HOPKINS.

STUART, J.—The only error assigned is that the decree is for costs *de bonis propriis*.

In return to a *certiorari*, an amended transcript is filed, by which it appears that the costs are to be levied of the goods and chattels which were of *A. B.*, deceased, in the hands of the executors to be administered, if they have so much in their hands; otherwise to be levied *de bonis propriis*.

The judgment as it originally stood against the executors individually for costs, in the first instance, is error. 1 Saund. 335, note 10. As shown in the amended transcript, it conforms to the general rule as to costs against executors (1). *Harrison v. Warner*, 1 Blackf. 385.

As the executors were not in fault, *Hopkins*, who obtained the erroneous decree, should pay the costs in this Court (2).

Per Curiam.—The decree is affirmed, at the costs of the appellee.

J. L. Jernegan, for the appellants.

J. A. Liston, for the appellee.

(1) "Whenever the action against an executor or administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such (except a release to himself) the judgment against him must be that the plaintiff do recover the debt and costs, to be levied out of the assets of the testator, if the defendant have so much, but if not, then the costs out of the defendant's own goods: otherwise the judgment will be erroneous. Where he pleads a release to himself, and it is found against him, the judgment is that the plaintiff do recover both the debt and costs, in the first place *de bonis testatoris*, *si*, &c., and *si non*, &c., *de bonis propriis*." 2 Williams on Ex'rs, 1409.

(2) As to the rule in relation to costs where the record of the inferior Court is amended after error brought, see Bac. Ab., tit. Amendment and Jeofails (G).

Nov. Term,
1854.

JONES v. YETMAN.

JONES
v.
YETMAN.

In replevin, under the R. S. 1843, if the goods specified in the writ were not found or replevied, or were not delivered to the plaintiff, by reason of his failing to give bond, &c., and their value as alleged, and as found by the verdict, was less than 20 dollars, the cause was not within the appellate jurisdiction of the Supreme Court.

Saturday,
December 16.

ERROR to the *Lagrange* Circuit Court.

STUART, J.—The question to be first settled in this case is the jurisdiction.

It was replevin, commenced before a justice, as long ago as 1846, for a cow and calf, of the alleged value of 18 dollars. It is governed, therefore, by the law of 1843. The justice found the property in the plaintiff, and assessed his damages at 2 dollars.

On appeal to the Circuit Court, the case was tried by jury. Verdict for the plaintiff, *Yetman*, finding the property to be in him, and assessing his damages at 15 dollars. Judgment accordingly. Motions for a new trial and in arrest overruled.

The record does not contain the evidence. There is nothing to show that the plaintiff, *Yetman*, ever gave bond and took the property into possession. Nor, for anything in the record, does it appear that the officer ever took or found the property, or ever had a writ for that purpose. A summons issued on the oath of *Yetman*, is the only process mentioned. The parties appeared in both Courts.

The case has been at least twice before this Court on motion to dismiss for want of jurisdiction. The motion was first made at the *May* term, 1849, and sustained.

The transcript was afterwards re-filed; and at the *May* term, 1850, the motion to dismiss for want of jurisdiction was renewed and overruled.

The case now stands on submission. The question of jurisdiction again comes up on the facts above indicated on the face of the papers.

This suit having originated in the justice's Court, we are to look then, first, for the amount in controversy. The

value of the property is alleged to be 18 dollars. If this is the true criterion of the amount in controversy, this Court has no jurisdiction. No appeal or writ of error lies to this Court in cases originating before a justice, when the amount in controversy is, exclusive of interest and costs, under the sum of 20 dollars. R. S. 1843, p. 628.

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To name the action replevin does not, in a justice's Court, necessarily make it so. The nature of the complaint gives character to the action.

From a careful inspection of the whole record, we are inclined to the opinion that the proceedings were had under the 215th and 216th sections of the act regulating the action of replevin before a magistrate, which are as follows:

"SEC. 215. If the goods and chattels specified in any writ of replevin can not be found or replevied, or have not been delivered to the plaintiff, by reason of his failing to give bond as above required, the defendant shall nevertheless be summoned, by virtue of such writ, to appear and answer to the plaintiff's action for the recovery of the value of such property.

"SEC. 216. In the cases specified in the last preceding section, such cause shall be heard and determined before such justice as other actions, and the plaintiff, if he recover, shall be entitled to judgment and execution for the value of such property, or of his interest therein and costs of suit." R. S. 1843, p. 898.

In that view of the case, the alleged value of the property claimed being less than 20 dollars, and the verdict less than that sum, this Court has no jurisdiction. The actual amount in controversy, on this hypothesis, is but 15 dollars, as ascertained by the judgment of the Circuit Court.

The following cases have a bearing more or less directly on the question: *Tripp v. Elliott*, 5 Blackf. 168, *Reed v. Sering*, 7 id. 135, *Bogart v. The City of New-Albany*, 1 Ind. 38, *Markin v. Jornigan*, 3 id. 548.

Per Curiam.—The writ of error is dismissed, with costs. *J. B. Howe*, for the plaintiff.

R. Brackenridge, Jr., for the defendant.

6	48
128	389

Nov. Term,
1854.

VEACH v. PIERCE.

VEACH
v.
PIERCE.

A power of attorney purported to authorize a confession of judgment in the Circuit Court, in favor of the payee, "for the amount of the principal and interest that" might "be due on four certain promissory notes given by" the debtor. A judgment was taken, by confession of the attorney, for a sum which, the record stated, was the full amount of the principal and interest due, at the taking of judgment, on the four notes specified in the warrant; but the notes were not shown, by any extrinsic testimony, to be the same notes therein referred to. The defendant having taken an appeal, the clerk certified in the transcript that four notes, which he copied therein, were placed on file in his office when the warrant was filed, and that upon them the judgment was rendered.

Held, that the warrant did not sufficiently identify the notes to authorize the judgment.

Held, also, that the certificate of the clerk, in relation to the filing of the notes and that the judgment was rendered thereon, was no part of the record.

Held, also, that the defect in the proceedings was not cured by s. 580, p. 162, 2 R. S. 1852.

If the defendant in a Court of Error rely upon a release of errors, he must plead the release specially.

Saturday,
December 16.

APPEAL from the *Grant* Circuit Court.

DAVISON, J.—*Pierce*, at the *March* term, 1853, filed in the *Grant* Circuit Court, an instrument in writing which reads thus: "Know all men by these presents, that I, *Jesse Veach*, do appoint and constitute *Isaac Vandeventer* my lawful attorney in fact, and do hereby authorize him, or any other attorney at law practising in the *Grant* Circuit Court, for me and in my name, to waive process and the filing of a declaration, and to appear in said Court on the first or any subsequent day of the *March* term, 1853, and then and there confess against me a judgment in favor of *Henry Pierce* for the amount of principal and interest that may be due on four certain promissory notes given by said *Veach* to said *Pierce*; said judgment to be in accordance with the contract specified in said notes. I further release all error in the proceedings, and do ratify whatever my said attorney may lawfully do in the premises. Witness my hand and seal this 15th of *March*, 1853.—*Jesse Veach*, [SEAL.]"

The record shows that the execution of the above warrant of attorney was duly proved, and that *Vandeventer*,

the attorney therein named, and also an attorney at law of that Court, appeared, waived process and a declaration, and confessed that *Veach* was justly indebted to *Pierce* 4,370 dollars, being the full amount of principal and interest then due on the four notes specified in the warrant. And *Veach*, by his attorney, released all error in the proceeding. Thereupon the Court gave judgment for the plaintiff below.

Nov. Term,
1854.

VEACH
v.
PIERCE.

The appellant contends that this judgment is irregular, because the notes which are alleged to be the cause of action, were not described in the warrant of attorney. *Gambia v. Howe*, 8 Blackf. 133, decides that "the nature of the liability must be disclosed with reasonable certainty, either in a declaration or in the warrant." The present case is clearly within that rule; the notes are merely referred to without date, amount, or other description. It is true, the clerk certifies that four notes, which he sets out in the transcript, were placed on file in his office at the time of the filing of the warrant, and that upon them judgment was rendered. But this purports to be a mere statement of the clerk, and, therefore, can not be regarded as a part of the record; nor was it shown that these notes were the same referred to in the warrant. The appellee contends that the alleged defect in the proceedings was cured by the judgment, and he relies on section 580, 2 R. S. 1852, p. 162. That section does not apply to the case before us, because the defect complained of is not of form but one of substance; nor does it appear "that the merits of the cause have been fairly tried and determined by the Court below."

Again, it is contended that the release of error in the warrant and judgment estops the appellant from calling in question the validity of the proceedings. What would have been the effect of the release, had it been set up by plea or answer to the assignment of errors, we are not called upon to decide. It is, however, settled law, that if the defendant in a Court of Error rely upon a release of errors, the release must be specially pleaded. *Adams v. Beem*, 4 Blackf. 128.—*Vick v. Maulding*, 1 How. Miss. 217.

Nov. Term, 1854. *Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

MILLER
V.
SHEARER. *J. W. Gordon and H. P. Biddle*, for the appellant.
J. Brownlee, for the appellee.

MYERS v. THE STATE.

Saturday, December 16. APPEAL from the *Henry* Court of Common Pleas.

Per Curiam.—The judgment in this case is reversed for the reasons given in *Spencer v. The State*, 5 Ind. R. 41, and *Simington v. The State*, *id.* 479; the questions arising in the record of each case being the same.

The judgment is reversed. Cause remanded, &c.

J. T. Elliott, J. H. Mellett and D. Nation, for the appellant.
E. B. Martindale, for the state.

MILLER v. SHEARER.

Scire facias, in the Circuit Court, to obtain an execution against real estate, upon the transcript of a judgment of a justice of the peace. Demurrer to the *scire facias* sustained, and judgment on the demurrer. Afterwards, in vacation, the plaintiff amended and re-filed his *scire facias*, and, at the following term, the Court awarded execution for want of an answer. No notice was given to the defendant, nor did he appear after the *scire facias* was amended. *Held*, that the awarding of the execution was error.

Saturday, December 16. ERROR to the *Huntington* Circuit Court.

PERKINS, J.—*Scire facias*, in the Circuit Court, to obtain execution upon the transcript of a judgment of a justice of

the peace. Demurrer to the *scire facias*, because it did not contain the averment that the defendant had lands in the county. Demurrer sustained, and final judgment for the defendant, that he go hence, &c., and recover his costs, &c.

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1854.

HIATT
v.
BROOKS.

Afterwards, in vacation, the plaintiff amended and refiled his *scire facias*; and, at the next succeeding term, the Court awarded execution against the defendant named in it, for want of an answer. There was no notice to, nor appearance by, the defendant after the amending and re-filing of the *scire facias*.

On the final judgment for the defendant on the demurrer, he was out of Court, and no further proceeding could be had against him except upon a new notice, or his re-appearance. Neither of these things appearing to have occurred, the judgment against the defendant must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. R. Coffroth, for the plaintiff.

D. M. Cox, for the defendant.

HIATT v. BROOKS and Others.

ERROR to the *Grant* Circuit Court.

Saturday,
December 16.

Per Curiam.—The writ of error in this case is dismissed, with costs, for want of jurisdiction, for the reasons given in *Duncan et al. v. Duncan et al.*, ante, p. 28.

J. Brownlee, for the plaintiff.

J. M. Wallace, for the defendants.

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1854.

MIKESILL v. CHANEY.

MIKESILL
v.

6 85
195 480

CHANEY.

In replevin, the plaintiff having obtained possession of the property by giving bond, suffered a non-suit at the trial. *Held*, that the defendant, notwithstanding, had a right, under s. 182, p. 702, R. S. 1843, to show the Court that he was entitled to the goods replevied, and thereupon to have judgment for their return, and a writ of inquiry for the assessment of damages for their detention.

Saturday,
December 16.

ERROR to the *St. Joseph* Circuit Court.

HOVEY, J.—*Chaney* sued *Mikesill* in replevin, under the R. S. 1843, for goods, &c. The defendant pleaded three pleas. 1. A denial of the unlawful taking and detention. 2. Property in himself. 3. Property in a stranger. In the second and third he prays a return of the goods, and that his damages may be assessed according to the statute. Issues of fact were formed, and the cause submitted to a jury. The plaintiff closed his evidence and suffered a non-suit.

The defendant objected to a discharge of the jury, but his motion was overruled. He then moved the Court for a judgment returning the goods and for a writ of inquiry to assess his damages, at the same time offering evidence to sustain his claim. The motions were overruled, and the Court rendered judgment in favor of the defendant for costs only.

Mikesill brings the case here on error.

By the 182d section, p. 702, R. S. 1843, it is provided that—"If it appear, upon a *non-suit* of the plaintiff, or after a trial or otherwise, that the defendant is entitled to a return of the goods, he shall have judgment and execution therefor, accordingly, with damages for the detention thereof, which may be assessed by a writ of inquiry."

We think a fair construction of this section would give the defendant below the right to show the Court that he was entitled to the goods, and that, upon such showing, the Court ought to have rendered judgment in his favor for the same, and caused the damages to be assessed for their detention. The object of this section was to give

the defendant the right to have the merits of the cause disposed of while it was yet in Court. By thus settling the merits, circuitry of action would be avoided, as the defendant would not be driven to the replevin bond for his remedy. The Court erred in overruling the defendant's motions.

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1854.

MILLER
v.
UPTON.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Liston, for the plaintiff.

MILLER v. UPTON.

If *A.*, being indebted to *B.*, puts in the hands of *C.* promissory notes, or other securities, with a request that *C.* shall deliver them, or pay the proceeds thereof, or a sum of money less than the value thereof, as the case may be, to *B.*, and *C.* promises *B.* that he will do so, the promise is founded upon a consideration.

The statute of frauds applies to the rules of evidence and not to those of pleading.

ERROR to the *Wells* Circuit Court.

Saturday,
December 16.

HOVEY, J.—*Miller* sued *Upton* in an action of assumpsit before a justice of the peace. The declaration contains three counts. The substance of the first count is that the defendant, on the 16th day of *December*, 1850, in consideration that one *Lewis S. Grove* was indebted to the plaintiff in the sum of 83 dollars, and in consideration that *Grove*, at the special instance and request of the defendant, had deposited in the hands of the defendant "a large amount of securities, viz., the amount of one hundred dollars," the defendant then and there, at the request of *Grove*, undertook and promised the plaintiff to deliver said securities to said plaintiff when requested. The count avers a request and a refusal to deliver the securities.

The second count is substantially the same as the first, except it states that *Grove* had placed in the hands of the

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MILLER
v.
UPTON.

defendant promissory notes of the value of 100 dollars, and that the defendant then and there, and at the request of *Grove*, undertook and promised the plaintiff to pay him said sum of 83 dollars, &c.

The third count states that the defendant, in consideration that *Grove* had before that time placed in his hands 100 dollars in vendue notes, and in consideration that *Grove* was indebted to the plaintiff in the sum of 83 dollars, and in consideration that *Grove* by his written order then and there directed the defendant to deliver to the plaintiff 100 dollars of said notes, the defendant undertook and promised the plaintiff to deliver him 83 dollars of said notes. Refusal to deliver averred, &c.

To these counts the defendant demurred, and the justice overruled the demurrer and gave judgment for the plaintiff. From that judgment the defendant appealed to the Circuit Court, and there, at the *August* term, 1853, filed demurrers to each count, alleging that said counts "did not state facts sufficient to constitute a cause of action." Other special causes were also assigned, but as they are not within section 50, 2 R. S. 1852, p. 38, we are not required to give them any further consideration.

The Court below sustained the demurrers, and rendered judgment against the plaintiff for costs, whereupon he appealed to this Court.

We think the Court erred in sustaining the demurrers. The counts state facts sufficient to constitute a consideration for the promises alleged to have been made by the defendant to the plaintiff, and it is not necessary to show in the declaration that such promises were reduced to writing, as the statute of frauds applies to the evidence and not to the pleadings. A declaration which would have been good before the enactment of that statute, would still be unobjectionable, although the evidence which would have formerly been sufficient to support the action might be wholly insufficient under the statute of frauds. See *Mills v. Kuykendall*, 2 Blackf. 47, and note 2.

The case of *Decker v. Shaffer*, 3 Ind. R. 187, referred to by counsel on both sides, has but little to do with the

question before us, as it was decided upon its merits, and not upon the pleadings; and the cases of *Farlow v. Kemp*, 7 Blackf. 544, and *Salmon v. Brown*, 6 *id.* 347, have but little analogy to this, as the declarations in those cases did not show any privity of contract, or promise by the defendants to the plaintiffs. The assumpsits attempted to be established in those cases were implied, but the declaration in this case charges an express promise.

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1854.

HORD
V.
THE CORPO-
RATION OF
NOBLESVILLE.

We will not, at this time, express any opinion as to whether parol proof could sustain the declaration, as that question is not properly before us; but there can be no doubt that a written promise by the defendant would be admissible for that purpose. The demurrers should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

B. Burns and *J. P. Greer*, for the plaintiff.

J. R. Slack, for the defendant.

HORD V. THE CORPORATION OF NOBLESVILLE.

6	55
170	539

A party after moving in arrest of judgment can not move for a new trial.

APPEAL from the *Hamilton* Court of Common Pleas.

Monday,
December 18.

STUART, J.—This was a proceeding before the mayor for a violation of one of the ordinances or by-laws of the town; and was appealed to the Common Pleas. Trial by jury, and fine of 5 dollars.

Here, as in many other cases decided lately, none of the evidence is in the record. The defendant also supersedes his motion for a new trial by first moving in arrest of judgment. *Bepley v. The State*, 4 Ind. 264.

Per Curiam.—The judgment is affirmed with costs.

W. Garver, for the appellant.

D. C. Chipman and *J. Robinson*, for the appellee.

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1854.

HARBIN v. THE STATE.

TAPLEY

v.

McGEE.

APPEAL from the *Knox* Circuit Court.

Monday,
December 18.

Per Curiam.—Indictment for assault and battery, found in the *Knox* Circuit Court, at the *March* term, 1853. Plea, not guilty. Trial by the Court, and judgment for the state.

This judgment can not be sustained. An act, approved *January* 16, 1849, gave to the justices of the peace of *Knox* county "exclusive original jurisdiction of all cases of" assault and battery within that county. This act was unrepealed and in force when the present indictment was found. Acts of 1849, p. 78. It follows that the offence was not within the jurisdiction of the *Knox* Circuit Court.

The judgment is reversed.

J. P. Usher, for the appellant.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

TAPLEY and Others v. McGEE and Others.

An infant can not appoint an agent or attorney.

An order of the Probate Court directing the payment of money of an infant distributee to a third person, as the agent of the infant, is erroneous.

It was error in the Probate Court, under the R. S. 1843, to order a distribution of moneys belonging to an intestate's estate, before final settlement, without directing the administrator to require a bond, with sufficient surety, for the return of the moneys, should the same be necessary for the payment of debts, &c., or to equalize the shares among those entitled thereto.

Where error is prosecuted against a party as an administrator, the plea *in nullo est erratum* admits his representative character.

Monday,
December 18.

ERROR to the *Ohio* Probate Court.

DAVISON, J.—At the *February* term, 1850, the clerk of the *Ohio* Probate Court reported to that Court that he had, in vacation, granted to *Daniel Tapley*, *Jerusha Brown* and *Hazlett E. Dodd* letters of administration upon the

estate of *John M. Daniels*, deceased, who died intestate. Whereupon they moved the Court to confirm their appointment; but the Court refused the motion, declared the letters granted to them by the clerk void, and, in their stead, appointed *Thomas Kempton* and *Lot North* administrators of said estate. *Kempton* and *North*, at the *November* term, 1850, filed their petition, representing that *John, Nancy, James, Darius* and *Boone McGee* were the heirs at law of the said *Daniels*; that they were minors, and one *Joseph Owens* was their guardian. The petition prays an order directing the estate to be reduced to assets, and that the administrators be authorized to make settlement with said heirs, &c.

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1854.

TAPLEY
V.
MCGEE.

The record shows that at a subsequent day of that term, the Court heard evidence in support of the heirship of said minors, and adjudged them to be the heirs of said decedent, and authorized the administrators to settle with them, or their legally constituted guardian; but directed said administrators not to make distribution of the estate until further order of the Court.

It also appears by the record, that *Kempton* and *North*, at the *February* term, 1851, by petition, represented that they had in their hands moneys belonging to said estate, more than were sufficient to satisfy all the debts against it, and prayed authority from the Court to pay over to *James S. Jelly*, the agent and attorney of *John, James, Nancy, Darius* and *Boone McGee*, the heirs aforesaid, all the moneys then in their hands, and such other money as they might thereafter collect, belonging to the estate, and take his receipt for the same.

Upon a final hearing of the petition, the Court made an order in accordance with the above prayer, directing the administrators to pay over to *Jelly*, as such attorney and agent, all moneys then in their hands, &c., and take his receipt, &c.

This order, we think, is erroneous. The heirs were minors, and, for that reason, were not competent to appoint an agent or attorney to receive and receipt for their respective distributive shares in the estate. The record

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1854.

TAPLEY
v.
MCGEE.

shows that they had a guardian, and it is difficult to perceive the reasons why the moneys were not directed to be paid over to him. He was obviously the person properly authorized to receive and control the estate of his wards. We know of no provision in our statutes in support of a decree requiring an administrator to pay over the distributive share of an infant to the agent or attorney of such infant.

But there is another ground upon which this decree must be held defective. The Court by its decree should have directed the administrators to require a bond with sufficient surety for the return of the moneys paid over to the distributees, "whenever necessary for the payment of debts," &c., "or to equalize the shares among those entitled thereto." Such direction to the administrator is a requirement of the statute, which should have been embraced in the final order of the Court. R. S. 1843, p. 550, s. 360.

We have seen that the letters of administration granted to the plaintiffs were revoked by the Court, and *Kempton* and *North* appointed in their stead; but no reversal of the order revoking the letters to the plaintiffs is shown. Therefore, it is contended, that they are not proper parties in this Court. What would have been the effect of this objection had it been raised by motion to dismiss the writ of error, is a point which, at this stage of the proceedings, is not properly before us. The plaintiffs, as administrators of the estate of *John M. Daniels*, deceased, have assigned errors. To this assignment the defendants have pleaded *in nullo est erratum*, and, by that plea, we think, they have waived their objection. *Rundles v. Jones*, 3 Ind. 35, decides that "the plea '*in nullo est erratum*' to the assignment of errors by an executor, admits his representative character." This authority is directly in point. We must, therefore, regard the plaintiffs before this Court in the character of administrators.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. W. Spencer and *P. L. Spooner*, for the plaintiffs.

D. S. Major, for the defendants.

SHANKS v. HAYES.

Nov. Term,
1854.SHANKS
v.
HAYES.

The Supreme Court will not disturb the verdict of a jury, upon the mere weight of evidence, where the evidence is conflicting.

The statements of a witness are not necessarily to be disregarded because they differ, in slight particulars, from what he swore to on a previous occasion; but only, in such case, where the jury believe that his evidence is wilfully and knowingly false in a material matter.

ERROR to the *Dearborn* Circuit Court.Monday,
December 18.

PERKINS, J.—Assumpsit upon a note. The case was tried upon the general issue under oath. Judgment for the plaintiff. It is urged that the judgment is not supported by the evidence.

There is sufficient evidence in the record, in favor of the plaintiff below, taken it by itself, to justify the judgment. There is also, in addition, conflicting evidence. It was all for the jury; and no rule is better settled than this, that in such case the Supreme Court can not disturb the action of the Court below in rendering judgment on the verdict of the jury.

A witness, *McElfresh*, testified that about the date of the note, *Shanks* borrowed money of *Hayes*; that certain persons were present; that a note, on paper cut from an old account-book, was prepared; "that *Shanks* stood at the table, and that he stooped over as if to make his mark to a piece of paper on the table," &c.

An attempt was made to impeach this witness, by proving that he had sworn differently about the transaction on a former occasion; and it was contended that the whole of his testimony should be rejected in consequence of the discrepancy shown.

The Court instructed the jury that they were not to disregard his testimony "because he may have made statements differing in slight particulars; but that they could only disregard the testimony of the witness in case they find that he wilfully and knowingly testified to what was not true, in a material matter."

We see no error in this instruction. It lays down sub-

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HOUSN
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stantially the rule that should have been applied by the jury in determining whether the whole of the testimony of the witness should be rejected or not. If the witness had, by mistake or through forgetfulness, stated some particular differently on different occasions, this would furnish no evidence of corruption or dishonesty on the part of the witness, and hence should not occasion his entire discredit. It is not pretended that any mental defect existed in the witness. It is taken for granted he was of sound mind.

An instruction was asked and refused, specifying particulars which should go to his discredit.

The Court had laid down the rule by which the jury were to be governed, viz., if they believed the witness had knowingly sworn falsely in a material matter, they were to discredit him. This belief was to be deduced from all the circumstances before the jury. It might arise from the statements, manner, contradictions, &c., of the witness, all considered together; and we do not think the Court was bound to be more particular in their instructions on this point.

We think the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

D. S. Major and A. Brower, for the plaintiff.

D. Macy, for the defendant.

HOUSE AND ANOTHER v. HOUSE.

Where a father and his adult children live together as members of a common family, there is no implied undertaking on the part of either to pay for service rendered, or board, &c., furnished; but the undertaking may arise from an express contract, or may be inferred from circumstances.

The moral obligation of a father to support an adult idiot son is greater than that of a brother, where the parties are equally able.

ERROR to the *Decatur* Court of Common Pleas.

Nov. Term,

1854.

PERKINS, J.—*Isaac House* filed in the Probate Court of *Decatur* county, in 1851, an account against the estate of his deceased father, *John House*, consisting of two items, one for the board, &c., of said *John House*, and the other for the board, &c., of his idiot adult son, *Jacob House*. Issue was taken on the validity of both items, a trial was had, and both were allowed and ordered by the Court to be paid.

House

v.

House.

Monday,
December 18.

It is a rule of law that where persons standing in the natural relation of those concerned in this case, live together as members of a common family, there is no implied obligation to pay for service rendered, on the one hand, or board, &c., furnished, on the other. But that obligation may arise from contract, and a contract may be inferred from circumstances.

The evidence shows that *Jacob House* was living with his father, *John*, as a member of his family, and was supported by him; that while the two were thus living, *Isaac House* purchased the farm of said *John*, on which he, with his idiot son, then resided, moved upon it, and subsequently supported him and the son; that the board of the father was to be paid for (for that is not controverted in the record), and that he had said he would pay for the support of his son.

From this, we think a contract to pay for the support of said idiot son might be inferred, and it having been done on the trial below, we shall not disturb the finding.

The moral obligation upon the father to support his unfortunate son, *Isaac*, was stronger than was such obligation upon a brother of that son, both being alive and able to render the support; and no reason is disclosed by the record why the father should be liable for his own board and not for that of other members of his family.

We think the judgment below was right, and should be affirmed.

Per Curiam.—The judgment is affirmed with costs.

J. S. Scobey, for the plaintiffs.

J. Robinson, for the defendant.

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1854.

ENGLISH
v.
ROCHE.

ENGLISH and Others v. ROCHE and Another, Administrators.

The description in a mortgage is sufficient whenever the land intended to be mortgaged can be ascertained by it.

A defendant in chancery can not object, on error, that other parties were improperly made co-defendants, when he has not been injured thereby.

Where persons are improperly made defendants to a bill, and no decree is taken against them, the complainant should be taxed with the costs occasioned by their being parties.

In a bill by administrators to foreclose a mortgage given to the intestate, they described themselves "as administrators of the goods," &c., "which were of" the intestate, giving his name and last residence. The bill also stated that on, &c., he died intestate, and that the complainants were duly appointed, &c. *Held*, that it sufficiently appeared that the complainants were administrators.

A husband may enter an appearance for his wife by attorney to an action.

The proper mode of showing that exhibits have been not proven, is by bill of exceptions.

Monday,
December 18.

ERROR to the Wabash Circuit Court.

HOVEY, J.—*Robert English* and *Michael English*, being indebted to *Henry Ossum* in his lifetime, executed and delivered to him a mortgage on the following real estate in *Wabash* county, to secure the payment of the same, to-wit: "The upper section of the two sections lying west of the *Salamony* river, granted to *Susan Richardville* by *John Richardville* in his late will and testament, the section hereby sold lying and being on the south side of the *Wabash* river, opposite to the town of *Lagro*, and commencing at the mouth of the *Salamony* river, thence running down *Wabash* river, according to the survey made by the general government."

Hannah English, wife of *Robert*, and *Martha English*, wife of *Michael*, joined in the mortgage, which was acknowledged in due form.

After the execution and delivery of the mortgage, *Henry Ossum* departed this life intestate, and *John Roche* and *William Ossum* were duly appointed administrators of his estate.

The bill was filed to foreclose the mortgage, and at the *September* term, 1851, the record recites that the defen-

dants, *Michael English, Robert English, Hannah English* and *Martha English* appeared by their attorneys, *Cox and Connell*, and filed their general demurrer to said bill. The demurrer which follows is in the names of *Robert and Michael*, the names of their wives not being inserted. The demurrer was overruled, "and the defendants, *Robert English, Michael English, Martha English* and *Hannah English*, refusing to withdraw said demurrer, or further to answer said bill, the Court do now order, adjudge and decree that the matters and things set forth in said complainants' bill are true," and rendered a decree for the complainants for the sum of 5,731 dollars and 25 cents, payable in one hundred and eighty days, and in default of payment, that said mortgaged premises should be sold, &c.

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1854.

ENGLISH
V.
BOCHE.

The defendants below bring the case here on error, and insist that the decree should be reversed—

1. "Because the bill and mortgage do not sufficiently describe the premises."

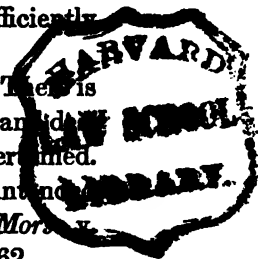
We can not perceive anything in this objection. There is no apparent ambiguity in the description, and the land described can be easily found, and its boundaries ascertained. The description is sufficient whenever the land intended to be mortgaged can be ascertained by it. See *Morse v. Dewey*, 3 N. H. 535.—*Buck v. Hardy*, 6 Greenl. 162.

2. "The bill makes *John Stewart, John P. Yelverton* and *Lycurgus Egerston* parties, without showing any interest they may have had in the matters in controversy."

There is no decree against them, and the other parties to the bill have no right to complain, as they have received no injury; but the complainants must be taxed with the costs occasioned by their being parties.

3. "The bill does not sufficiently show that the said defendants in error are the administrators of *Henry Ossum*, deceased."

There is nothing in this objection. The complainants describe themselves as "administrators of the goods and chattels, rights, credits, moneys and effects which were of *Henry Ossum*, late of *Huntington* county, deceased, who died intestate." The bill further states that "on or about



Nov. Term, the 1st day of *October*, 1848, said *Henry Ossum* died intestate, and that your orators were duly appointed," &c.

CULBERTSON 4. "The decree could not be legally made until guardians *ad litem* were appointed by the Court for the wives of *Robert* and *Michael*."

TOWNSEND.

Husbands have the right to enter appearances for their wives by attorney. 1 Dan. Ch. Pr. 217. The record shows they did so appear.

5. "The exhibits do not appear to have been proven."

The case of *Ward v. Kelly*, 1 Ind. 101, is considered as overruled by the reasoning in the case of *Brown v. Woodbury*, decided at the *May* term, 1854 (1). In the last-named case, the Court held that the proper mode of showing that exhibits had not been proven, is by bill of exceptions.

Per Curiam.—The decree is reversed as to the costs which accrued by reason of the joinder of *Stewart*, *Yelverton* and *Egerston* as defendants. The residue is affirmed. *D. M. Cox*, for the plaintiffs.

(1) 5 Ind. R. 354.

CULBERTSON v. TOWNSEND.

In *assumpsit* against a surviving partner, for goods sold to the firm, it is not necessary to notice the deceased partner in the declaration, but if it is done, the rules of pleading require a negative in the breach of payment by the deceased.

The want of such negative can not, however, be objected to after verdict.

Where the declaration contains a good count, corresponding with the breach, the judgment will not be reversed on account of the inapplicability of the breach to other counts.

Monday,
December 18.

ERROR to the *Knox* Circuit Court.

HOVEY, J.—*Assumpsit*. The declaration contains two counts for goods sold and delivered. The first states that the trees, which are the subject-matter of this suit, were sold and delivered to *Samuel Culbertson*. The second

count states that the trees were sold and delivered to *Samuel* and *Isaac Culbertson*, and that *Isaac* having departed this life, *Samuel* undertook and promised to pay, &c. General breach, that *Samuel* had failed and refused to pay, without making any negative averment that *Isaac* had failed to pay during his lifetime. Plea, the general issue, with notice of set-off, and verdict and judgment in favor of the plaintiff below for 865 dollars.

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CULBERTSON
v.
TOWNSEND.

The plaintiff in error insists that the judgment should be reversed for three reasons—

The first is, that the breach does not negative the payment by *Isaac Culbertson*, deceased.

Where actions are brought against a surviving partner, in cases like this, it is not necessary to notice the deceased partner in the declaration; but having done so, the rules of pleading would require a negative in the breach as to the payment by the deceased. The failure to make such negation would be open to demurrer; but such objection comes too late after verdict. 1 Peters 68. But this position would be untenable, were the law otherwise, under the state of the pleadings, as there is one good count in the declaration which fully corresponds with the breach. R. S. 1843, p. 732, s. 322.—*Newell v. Downs*, 8 Blackf. 523.

The second and third points presented in argument deny *Townsend's* right to maintain this action, on the ground that the facts will not sustain the declaration—

1. Because *Townsend* could not waive the tort and recover in this form of action; and,

2. Because the *Culbertsons* cut the timber as the servants of the *Wabash Navigation Company*, which, it is alleged, is alone responsible under its charter. We do not think the evidence sufficiently clear to justify this Court in passing upon the second and third points raised in argument.

The *Culbertsons* were to finish and complete certain locks for the company, and were to be paid for work and materials furnished in the construction of the same, upon estimates made by the engineer of the company.

Thomas A. Smith, a witness for *Culbertson*, says he "was

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v.
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SCHEID.

acquainted with the character of the timber sold by *Townsend* to *Culbertson*," and describes it.

Henry Uiter, on behalf of *Culbertson*, testifies to a conversation had between himself and *Townsend*, in which he says *Townsend* said, that "he had made a donation of the timber for the mitre-sills and lock-gates, and that the rest of the timber he was to have pay for."

The timber was used in the construction of the locks, and *Culbertson* received partial payment for the same before this suit was brought. The contract between the company and the *Culbertsons* shows that the company did not intend to make itself responsible for either work or materials in constructing the locks, to any other person or persons than the *Culbertsons*. The testimony is voluminous and somewhat conflicting, and one phase of it might devolve upon us the necessity of investigating the complicated questions involved in the second and third points presented by the plaintiff; but from the whole testimony, we can not say that the jury might not reasonably presume the existence of a contract between the parties in regard to the trees.

Such being the character of the testimony, it is not necessary that we should decide the points secondly and thirdly presented by the plaintiff.

Per Curiam.—The judgment is affirmed with costs.

O. H. Smith and *S. Yandes*, for the plaintiff.

S. Judah, for the defendant.

HAASE v. ROEHRSCHIED.

A Court will not make an allowance to a father for the education and support of his minor children, if his private means are sufficient for the purpose; and on an application for such allowance, the insufficiency of his private means must be shown affirmatively.

An allowance will be made out of an infant's estate for his education, if the father is unable, out of his private means, to educate him.

APPEAL from the *Wayne* Court of Common Pleas.

Nov. Term,
1854.

DAVISON, J.—*Wilhelm Haase*, at the *January* term, 1853, filed a petition in the *Wayne* Common Pleas, setting forth that *John Roehrscheid* died in the year 1849, intestate, leaving personal estate worth 2,350 dollars, which estate has been finally settled by a proper administrator; that fourteen years prior to *John's* death, the plaintiff became the husband of *Barbara Roehrscheid*, the sister and one of the heirs of the intestate; that in *September*, 1849, just three months after the death of her brother, she died, leaving two children, the issue of her marriage with the plaintiff, viz., *Magdalena Haase* and *Wilhelmina Haase*, the former aged seven, and the latter thirteen, and also one child by a former husband, named *George Paulus*; that *George Roehrscheid*, the defendant, was appointed by the Probate Court of *Wayne* county guardian of these children, and in that capacity received 470 dollars, the share of *Barbara* in the intestate's estate, to which his wards were entitled as her heirs, and of which 333 dollars and 33 cents belonged to the plaintiff's children.

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V.
ROEHRS-
SCHEID.

Tuesday,
December 19.

The petition states that the plaintiff, and both the children, reside in the state of *Ohio*; that on the 11th of *March*, 1851, he was appointed by the Court of Common Pleas of *Hamilton* county in that state, their guardian, and as such was duly sworn and gave bond, &c., and that an authenticated copy of his letters of guardianship is now on file in the *Wayne* Common Pleas, &c.; that he has maintained and still continues to maintain his children by his personal labor; that he has educated them, as far as his limited means will enable him, but that they are in need of further education; and for the purpose of their maintenance and education, the petition prays an order directing the defendant to pay into Court, for the plaintiff's use, such sums of their moneys in his hands as may seem right, &c.

There was a demurrer sustained to the petition, and judgment given for the defendant, &c.

The character in which the plaintiff sues, whether as parent or guardian, is not plainly shown; but there being

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1854.

HAASE
v.
ROWERS-
ORRIS.

no sufficient ground stated for a recovery as guardian, the petition must be regarded as an application to the Court by a father, who desires to procure means from the estate of his minor children for their support and education.

In relation to this subject, there is a statute which provides that "every guardian shall have the custody and tuition of such minor, and the management of such minor's estate, during minority," &c., "provided, that the father of such minor, or, if there be no father, the mother, if suitable persons respectively, shall have the custody of the person and the control of the education of such minor;" that "when any ward has no father or mother, or such father is unable, or fails to educate such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify." 2 R. S. 1852, p. 324, ss. 6 and 9.

Under these provisions it becomes the duty of the Court, a proper case being presented, to direct the guardian to pay over an amount of the ward's estate necessary for his maintainance and education. But is such case shown by the petition? It alleges, 1. That the plaintiff had maintained and still maintains his children by personal labor. 2. That he has educated them as far as his limited means will enable him, but they are in need of further education.

The first allegation is insufficient. It is the duty of a father to support and educate his minor children, and unless he can show affirmatively that he is, in point of means, unable to perform that duty, he will not, for such purpose, be allowed a claim upon their estate. No want of ability in the plaintiff to support his children is indicated by the language used in the allegation.

But the second charge is, in our opinion, sufficient to authorize the Court to hear the case upon evidence. It is, in effect, alleged that the children are in want of education, and that their parent is unable to contribute means for that purpose. This brings the case, so far as it relates to the education of the minors, within the provisions above quoted.

We think, therefore, that the demurrer should have been overruled. Nov. Term,
1854.

Per Curiam.—The judgment is reversed with costs. NAGLE
v.
HORNBERGER.

T. Means, for the appellant.

NAGLE v. HORNBERGER.

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The Supreme Court will more readily control the discretion of the Court below in refusing a new trial than in granting it, because the refusal operates as a final adjudication between the parties.

The granting of a new trial by the Circuit Court is a matter within its sound discretion, and will not be disturbed by the Supreme Court unless a flagrant case of injustice is made to appear.

ERROR to the *Franklin* Circuit Court.

Tuesday,
December 19.

DAVISON, J.—*Nagle* sued *Hornberger* in an action of trespass, in the *Dearborn* Circuit Court, for an assault and battery, and in that Court recovered a verdict for 400 dollars. Upon the defendant's motion, a new trial was granted. Thereupon he moved for and obtained a change of venue to the *Franklin* Circuit Court. In the latter Court there was a verdict and judgment in favor of the plaintiff for 100 dollars.

The plaintiff contends that the Circuit Court erred by sustaining the motion for a new trial, and upon that error alone he seeks to reverse the judgment, and asks this Court to set aside all the proceedings in the case subsequent to the first verdict, and direct the *Dearborn* Circuit Court to render a judgment thereon in his favor for the 400 dollars.

The reasons assigned for a new trial were these: 1. The verdict was contrary to law and evidence. 2. The jury disregarded the charge of the Court. 3. The damages were excessive. 4. Improper conduct of the jury. 5. Newly discovered evidence.

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1854.

NAGLE
v.
HORNBERGER.

The two last reasons were strongly supported by affidavits; but their force was, to some extent, impaired by counter affidavits produced by the plaintiff.

As a general rule, the Supreme Court will always more readily control the discretion of the Court below in refusing a new trial than in granting it, because the refusal operates as a final adjudication of the rights of the parties. *Oliver v. Pace*, 6 Georgia R. 185. Also it has been ruled "that the granting of a new trial by the Circuit Court is a question of sound discretion, which will not be disturbed in an appellate Court, unless a flagrant case of injustice is made to appear." *Powers v. Bridges*, 1 Greene 235. The principle recognized by these decisions is no doubt correct.

In the case before us, we have carefully examined the affidavits, both for and against the alleged reasons for a new trial, and are satisfied that no injustice could result from the discretion exercised by the Court. The newly discovered evidence, it is true, was merely cumulative, and that alone is considered insufficient to support such motion; but the conduct of the jury during the trial does not appear to have been strictly correct. The trial continued several days, and as the Court adjourned from time to time, the jury, against its express order, separated, and boarded and lodged apart from each other. This was not in accordance with their duty as jurors, and, under the circumstances as they appeared to the Court, may have constituted a cause sufficient to set aside the verdict.

In addition, it is not even clear that the weight of evidence sustained the verdict.

There is nothing in the record that would authorize us to pronounce the decision granting a new trial erroneous.

Per Curiam.—The judgment is affirmed with costs.

E. Dumont and *D. S. Major*, for the plaintiff.

J. Ryman, for the defendant.

BARNES and Another v. McALILLY.

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1854.GAFNEY
v.
REEVES.

Points raised by the record may be treated as having been waived by the appellant, under a rule of the Supreme Court, by a neglect to file a brief.

APPEAL from the *Warren* Court of Common Pleas.

Tuesday,
December 19.

Per Curiam.—Complaint on note. Judgment by default for the plaintiff. The only point raised by the record, if indeed it is, relates to the time of the service of process. The Court below was satisfied that it had been served ten days before Court. So says the record.

Were there really anything in the point, we might treat it as waived, there being no brief in the case (1).

The judgment is affirmed, with 1 per cent. damages and costs.

J. R. M. Bryant, for the appellants.

L. Barbour and *A. G. Porter*, for the appellee.

(1) See note to *Howard v. Cobb*, *ante*, p. 5.

GAFNEY and Others v. REEVES.

Exhibits, under the chancery practice, might be proved by parol.

Evidence offered in proof of an exhibit may be placed upon record by a bill of exceptions.

Where proof of an exhibit was necessary to support a decree, it will be presumed to have been given, unless the contrary appear by bill of exceptions or be otherwise shown by the record.

APPEAL from the *Wayne* Circuit Court.

Tuesday,
December 19.

PERKINS, J.—Bill to foreclose a mortgage. It alleges that one *Abraham Kinsey* owned the mortgaged property, and sold it to *Michael Gafney*, giving a bond for a deed, and that he had received the purchase-money. It further

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1854.

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v.
REEVES.

alleges that afterwards, in 1849, *Gafney* and wife mortgaged said property to *Reeves* to secure the payment of a named sum of money, and that subsequently he executed a junior mortgage on the same property to one *Storms*, &c. It alleges that the money due to *Reeves* has not been paid, &c., makes *Kinsey*, *Gafney* and wife, and *Storms*, parties, and prays a foreclosure and sale, and that *Kinsey* be estopped to set up any right, &c. It avers that no suit has been instituted at law.

Storms made default. *Kinsey* and *Gafney* and wife demurred to the bill, the demurrer was sustained, and, they refusing to answer further, the cause, says the record, was set down for final hearing, "and the Court having heard the same," after due deliberation, find, &c.

The mortgage and note were made a part of the bill by incorporation.

The Court decreed that the defendants, by, &c., pay the amount found due to *Reeves* on his mortgage, and, in default, &c., that the property be sold to make the sum; that *Reeves* be first paid, *Storms* next, that *Gafney* pay the costs, &c., and that *Kinsey* be barred, &c. The decree is against *Gafney's* wife as well as the other defendants.

It is objected to this decree that it creates a personal liability on the part of *Kinsey* and *Storms* to pay the debt to *Reeves*. Not so. The whole proceeding shows plainly enough the relative situation of the several parties; and the legal effect of the decree is to give *Kinsey* and *Storms* the right to pay *Reeves* and be subrogated to his rights against *Gafney* and the mortgaged land. It gives them the right to redeem, and, in default of redemption, orders the property to be sold, &c.

It is objected that the decree is against *Gafney's* wife without proof. It is insisted that in chancery cases all the evidence given must appear in the record without a bill of exceptions.

Such is the rule of chancery practice in *England* and *America*. Such has been the rule in this Court. *Work et al. v. Doyle et al.*, 3 Ind. 436.—*Comley et ux. v. Hendricks*, 8 Blackf. 189.—*Ward et al. v. Kelley*, 1 Ind. 101, and cases

cited. The rule grew out of the fact that in chancery evidence is mostly by depositions, naturally copied into the record. In the case of a foreclosure of a mortgage, it is not often that the necessity arises for any proof except of the exhibits. No such necessity arose in the present case; and exhibits may be proved by parol. This has been long settled in *England* as well as in *America*.

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1854.

WEATHERLY
V.
HIGGINS.

Now, it is mere matter of practice how that parol evidence shall be placed upon the record, and being so, it might be regulated at any time by a rule of Court, or by a decision, which, of course, would constitute a rule; and this Court, by its later decisions, has declared that such evidence may be placed upon record by a bill of exceptions; and that it need not necessarily appear without a bill. *English v. Roche, ante*, p. 62, and case cited.

This being the case, where it is not so incorporated, it will be presumed to have been given, but not made a part of the record, unless the contrary be shown by the record. Hence, in this case, it will be presumed the proof was made.

It is said the bill does not show that *Kinsey* had been paid his purchase-money. We think it does.

It is urged that it was error to pay *Reeves* in preference to *Storms*. It was not, because the mortgage of *Reeves* was the oldest, and neither appears to have been recorded.

Per Curiam.—The decree is affirmed, with 5 per cent. damages and costs.

O. P. Morton and *N. H. Johnson*, for the appellants.

J. B. Julian, for the appellee.

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WEATHERLY v. HIGGINS.

The intention of section 20, p. 19, 2 R. S. 1852, was, that appeals from the Courts of Common Pleas to the Circuit Courts should stand for trial, in the latter Courts, on their merits.

Nov. Term, Section 336, p. 114, 2 R. S. 1853, authorizes the Court to direct the jury to find a special verdict, without being requested by either party.

1854.

WEATHERLY
v.
HIGGINS.

Earnest money paid may be recovered back upon a failure of the party who received it to comply with his part of the contract.

Growing corn is as capable of delivery as any other article of commerce.

An instruction may properly be refused which would tend to mislead the jury. Instructions must be objected to before the return of the verdict, or all errors therein will be considered as waived.

A party who has neglected to move for a new trial or in arrest of judgment, can not afterward object to the form of the verdict.

Tuesday,
December 19.

APPEAL from the *Decatur* Circuit Court.

HOVEY, J.—Assumpsit by *Higgins* against *Weatherly*, for a breach of contract for the sale of hogs and corn. The action was commenced in the Court of Common Pleas, and at the *January* term, 1853, *Weatherly* appeared and filed the general issue and seven special pleas. The special pleas were demurred to, and the demurrers sustained as to the third, fourth, sixth, seventh and eighth, and overruled as to the second and fifth. Issues in fact were formed upon the first, second and fifth, tried by jury, and verdict and judgment for the defendant below. *Higgins* appealed to the Circuit Court, and at the *May* term, 1853, the cause was again submitted to a jury, and the Court, without being requested, directed them to return a special verdict. In compliance with the direction of the Court, the jury returned a special verdict setting out the facts, but did not specify the amount of damages. The Court, upon the basis of the facts returned, assessed the amount of damages, and rendered judgment in favor of the plaintiff below. No motion was made for a new trial or in arrest of judgment.

Several objections are raised by bills of exception.

1. *Weatherly* objected to the cause being tried *de novo* in the Circuit Court, and insisted that it should be tried on error. It was evidently the intention of section 20, p. 19, 2 R. S., that such appeals should stand for trial on their merits in the Circuit Court.

2. It is insisted that the Court erred in calling back the jury and directing them to find a special verdict; but we think a fair construction of section 336, p. 114, 2 R. S.,

confers that power upon the Court. The words, "unless otherwise directed by the Court," show that the legislature intended to clothe the Court with that power.

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1854.

WEATHERLY
v.
HIGGINS.

The following instructions were tendered to the Court by *Weatherly's* counsel and refused:

"1. If the jury find for the plaintiff, they can not find the amount of earnest money paid on the contract to the defendant."

"3. The corn growing in the field was not susceptible of delivery by act of the defendant, and before the plaintiff can recover for that, he must show to the satisfaction of the jury that he was prevented from gathering it by the defendant, as well as his readiness to perform his part of the contract.

"4. If the jury believe that it was part of the agreement that the contract was to be reduced to writing, and the plaintiff refused to do so, and the defendant offered to pay back the earnest money, and the plaintiff refused to accept, he can not recover. If the time for the delivery of the hogs was extended by the parties, and the plaintiff took them before the expiration of that time, the defendant was not in default; a readiness or ability to pay upon the part of the plaintiff is not a sufficient tender."

These instructions were correctly refused.

As the plaintiff claimed the money paid, in his declaration, he would be entitled to recover it under a special count, and the first instruction was, therefore, correctly refused. See *Chitty on Contracts* 445, and notes.

The third instruction would tend to mislead the jury, as it charges that "growing corn was not susceptible of delivery." Growing corn can be as easily delivered as any other article of commerce.

The fourth instruction is erroneous, because it assumes that if the plaintiff took the hogs the defendant was not in default. He might not have been in default as to the hogs, but a delivery of the hogs would not have shielded him from damages as to the corn.

Several instructions given by the Court are complained of, but there is nothing in the record showing that they

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1854.
ANDERSON
v.
FRY.

were objected to before the return of the verdict. The record must show that they were objected to before the return of the verdict, or the errors they contain must be considered as waived. *Jones v. Van Patten*, 3 Ind. 107.—*Roberts v. Higgins*, 5 *id.* 542.

Although the special verdict was imperfect, as there was no motion for a new trial or in arrest of judgment, it is too late to raise the objection.

Per Curiam.—The judgment is affirmed with costs.

J. R. Coverdill, C. S. Parrish and J. Robinson, for the appellants.

J. S. Scobey and J. Ryman, for the appellee.

ANDERSON v. FRY.

Debt upon a judgment rendered in another state. A transcript of the judgment having been offered in evidence, the defendant objected to its admission, and having been required by the Court to point out the grounds of his objection, he stated that "there was no valid judgment recited in the transcript." The trial was while the act of 1851, "in relation to bills of exceptions," (Acts 1851, p. 47,) was in force. *Held*, that the objection was too general.

A judgment rendered in another state by a Court which has obtained jurisdiction of the subject-matter and the parties, is conclusive in this state; and errors between the service of the summons and judgment can not be taken advantage of collaterally.

Tuesday,
December 19.

ERROR to the *Bartholomew* Circuit Court.

HOVEY, J.—*Fry* brought an action of debt against *Anderson*. The declaration sets out a judgment rendered May 4, 1852, in a Court of record in the state of *Ohio*. An issue was formed upon the plea of *nul tiel record*, and judgment was rendered for the plaintiff below.

The record contains a bill of exceptions, from which it appears that a transcript of the *Ohio* judgment was offered in evidence. The transcript shows that *Fry* sued *Ander-*

son in an action of slander, and that he was duly served with process on the 29th day of *June*, 1850; that the declaration was filed *July* 31st following, and *Anderson* ruled to plead by the next rule-day. The cause was continued from term to term until *May*, 1852, when the record shows an assessment of 1,000 dollars damages by a jury of inquiry, for which the Court rendered final judgment. The record is silent as to a default or verdict.

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1854.

ANDERSON
v.
FET.

On the trial in the Circuit Court, *Anderson's* counsel objected to the reading of the transcript in evidence, and being required by the Court to point out his objections, did so by saying that "there was no valid judgment recited in the transcript."

In the case of *Camden v. Doremus* and Others, 3 Howard 515, the Supreme Court of the *United States* decided that a general objection to testimony, without stating the grounds, should be wholly disregarded; and the same doctrine was subsequently sanctioned by this Court in the case of *Russell v. Branham*, 8 Blackf. 277. This healthy and safe rule was subsequently modified by "An act in relation to bills of exceptions," approved *February* 13th, 1851, which provides—

"That in all cases where any bill of exception shall be or shall have been taken in any Court to the ruling of such Court in admitting or rejecting of any evidence offered or given on any trial in such Court, it shall not be held necessary in any other Court to which a record of such cause shall be taken on error or by appeal, that the ground of objection to such evidence, or the opinion of said inferior Court, should appear in such bill of exception; but the superior Court shall determine, upon the whole record, as to the rightfulness of admitting or extending such evidence, and decide accordingly, unless such bill of exception shall show that the party presenting the same was required, at the time of taking his exception, to state the cause of objection and refused to give it." Acts 1850-1, p. 47.

We do not think that the general manner in which *Anderson's* counsel objected to the judgment would bring his

Nov. Term, objection within the foregoing section. But giving it the
1854. fullest latitude, the Court committed no error in over-
ruling it.

BRUSH
v.
CARPENTER.

The *Ohio* Court having obtained jurisdiction over the subject-matter and *Anderson*, their judgment is conclusive between the parties until reversed, and the intermediate errors between the service of the summons and judgment, can not be taken advantage of collaterally.

Per Curiam.—The judgment is affirmed with costs.
W. Herod and *S. Stansifer*, for the appellant.

BRUSH v. CARPENTER.

An oral promise by *A.* to *B.* to indemnify *B.* against loss, if he will become replevin bail for *C.*, is void under the statute of frauds.

If *A.* places in the hands of *B.* money to be paid to *C.*, to indemnify him for having, as replevin bail, paid a judgment against *A.*, and *B.* promises *C.* to pay *C.* the money, *C.* can sustain an action therefor.

In a suit originating before a justice of the peace, no great strictness as to the form of action and pleading is generally required.

Wednesday,
December 20.

ERROR to the *Ohio* Circuit Court.

PERKINS, J.—*Carpenter* sued *Brush*, before a justice of the peace, in an action of assumpsit, for 23 dollars and 50 cents. The cause went by appeal to the Circuit Court, where the plaintiff had judgment.

It appears that *Carpenter* became replevin bail for one *Anderson*, upon the request of *Brush*, and on his promise to indemnify against loss, &c.; and that *Carpenter* had been compelled to pay, as such bail for *Anderson*, a fraction over 20 dollars.

The evidence further tends to show that *Anderson* had placed money in the hands of *Brush* to pay the amount *Carpenter* had paid for said *Anderson*, and that *Brush* had promised *Carpenter* to pay him the amount.

It is urged, in this Court, by counsel, that the promise of *Brush* to *Carpenter* to indemnify him as bail, was void under the statute of frauds, not having been in writing.

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This position seems to be well settled by the latest authorities. *Nelson v. Boynton*, 3 Metcalf 396.—*Kingsley v. Balcombe*, 4 Barb. S. C. Rep. 131.—*Green v. Cresswell*, 10 Adolph. and Ellis 453. But it does not dispose of the case.

If *Anderson* placed in the hands of *Brush*, for the use of *Carpenter*, the money to pay the latter, and *Brush* expressly promised the latter to pay it to him, *Anderson* being thereby released from liability to *Carpenter*, *Carpenter* can sustain an action against *Brush* for the amount. Such a state of facts might be inferred by a jury from the evidence.

But it is further urged that *Brush* had actually paid *Carpenter* before the institution of this suit.

The evidence on this point was, that *Brush*, on one occasion, when called on to pay, gave *Carpenter* "a note on *Tower Lemon*, and told him to go to *Lemon* and get the money; that if *Lemon* did not pay the money, to bring the note back, and he, *Brush*, would pay the money;" that *Carpenter* did go to *Lemon* and demand the money, but failed to get it, and that it had not yet been paid by *Lemon* to any one. *Lemon* is solvent. The note was tendered back at the trial—perhaps before the suit. The note was not assigned to *Carpenter*.

These facts did not show that the note was taken as payment, nor that it had produced payment, but the contrary; and constituted no bar to this suit.

Had negligence in the matter been fixed on *Carpenter*, the case might have been different. He might thus have made the note his own, and been bound to account for its amount. See *Spangler v. McDaniel*, 3 Ind. R. 275.

The suit having originated before a justice of the peace, no great strictness as to form of action, and pleading generally, is required.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

D. Kelso and J. W. Gordon, for the plaintiff.

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1854.

MERCER

v.

DOE.

6	80
136	698
6	80
139	197
6	80
141	448

MERCER and Another v. DOE on the demise of NUTTING.

A sale of land might be made without appraisement, under the act of 1841, on an execution issued under the direction of the Circuit Court, upon *scire facias* on a justice's transcript to bind real estate.

In ejectment by the execution-defendant against the purchaser to recover land sold upon execution, the latter need only show, *prima facie*, a judgment against the former, an execution and a sale thereon, and a sheriff's deed.

An appraisement of land sold upon execution will be presumed to have been made, if the law required an appraisement, until the contrary appears.

Wednesday,
December 20.

APPEAL from the *Wabash* Circuit Court.

DAVISON, J.—Ejectment for a tract of land in *Wabash* county. The Court tried the cause and gave judgment for the plaintiff. The record professes to set out all the evidence given on the trial.

Nutting, the plaintiff's lessor, on the 14th of *April*, 1841, executed his promissory note to one *Robert D. Helm*, upon which *Helm* recovered a judgment before a justice of the peace. With a view to obtain a lien upon *Nutting's* land, a transcript of that judgment was filed in the *Wabash* Circuit Court. By *scire facias* on this transcript, *Helm*, at the *March* term, 1846, obtained a judgment in said Court against *Nutting*. Upon that recovery a writ of *feri facias* was issued, by virtue of which the land in controversy was sold to *Helm* for 69 dollars, and a deed, pursuant to the sale, was executed to him by the sheriff. After this, *Helm*, by deed in fee, conveyed the premises to the defendants below, who were in possession, &c.

The levy, sale, and return of the writ were sufficiently shown by the sheriff's deed; but whether the land was sold with or without appraisement, does not appear in the record. Was proof of such appraisement essential to the defence of the action? This is the only question in the case.

An act in force when the above note was given, provided that no real property should be sold on execution for less than one-half the appraised value thereof, and also for the selection of appraisers to ascertain its cash value, &c. Acts of 1841, p. 130, ss. 6 and 7. The appellee con-

tends that these provisions are applicable, and should be applied, to the sheriff's sale in question. This position the appellants deny, and they insist that the act referred to excepts from its operation the judgment rendered on the transcript. The ninth section is in these words: "That the provisions of this act shall not extend to judgments on *scire facias*, judgments or other legal proceedings against state, county, or township officers for neglect or malfeasance in office, against attorneys for neglecting or refusing to pay over moneys collected, and on bonds for the delivery of property levied on by execution." The language of this provision, so far as it relates to "judgments on *scire facias*," is general, and should receive a general construction, unless by looking into the whole act something can be found to limit or restrict it. The reasons why such judgments were excepted may not be obvious; still the exception leads to no absurd results. Nor is there anything in the entire enactment that indicates a legislative intention to restrict the general import of the words used in the provision. We are of opinion that all "judgments on *scire facias*" were intended to be excluded from the operation of the statute, and therefore that the sheriff's sale was valid without appraisalment. *Smith's Comm.*, s. 478, p. 627.—*Jones v. Jones*, 6 Shep. 308.

We perceive no ground upon which the decision of the Circuit Court can be sustained. If an appraisalment of the land had been required to give validity to the sheriff's sale, proof that it was appraised was not incumbent on the appellants. Against the title of the plaintiff's lessor, he being the execution-defendant, they were only bound to show a judgment, execution, sale, and sheriff's deed. This they have done. It is true, when the law requires a sheriff to appraise property taken on execution, a sale without appraisalment would be a nullity; but in the absence of any proof on the subject, he will be presumed, in that respect, to have done his duty. *Carpenter v. Doe*, 2 Ind. 465.—*Doe v. Collins*, 1 *id.* 24.—*Duncan v. Duncan*, 3 Iredell 317.

The judgment must be reversed.

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Nov. Term, 1854.	<i>Per Curiam</i> .—The judgment is reversed with costs. Cause remanded, &c.
HEADY v. WOOD.	<i>D. D. Pratt and S. C. Taber</i> , for the appellants. <i>D. M. Cox</i> , for the appellee.

HEADY v. WOOD.

The Supreme Court do not regard it their duty, under the rules of the Court, minutely to examine instructions, for abstract errors, where no specific errors are pointed out.

To recover damages for an assault and battery, it is not necessary that the plaintiff should have fled to avoid injury: if he used ordinary care to prevent injury, but it ensued from the wrongful act of the defendant, he is entitled to recover.

Wednesday,
December 20.

APPEAL from the *Hamilton* Court of Common Pleas.

HOVEY, J.—*Wood* sued *Heady* in an action of trespass. The declaration charges that *Heady* assaulted, beat and pushed *Wood* into and against the running cars on the *Peru and Indianapolis Railroad*, whereby the left arm of said *Wood* was broken and mashed, &c. The defendant pleaded the general issue; the cause was submitted to a jury, and a verdict returned in *Wood's* favor for 70 dollars. The defendant moved in arrest of judgment and for a new trial, but both motions were overruled, and judgment rendered on the verdict. *Heady* appeals.

The counsel for the appellant contends that the Court erred in giving instructions; but, as no specific error is pointed out in their very brief brief, we do not deem it our duty, under the rules of this Court, to sift all of the instructions for abstract errors. The whole of the evidence not appearing in the record, it would be difficult for us to say whether the instructions were properly given or not. The 94th section, 2 *Greenleaf* on Evidence, the only authority cited, has been examined, and we find nothing in it that conflicts with the ruling of the Court below.

Upon the partial view of the evidence which the bills of exceptions present, we would be inclined to the opinion that there was sufficient evidence before the jury to authorize them to find the verdict. The law does not require that a plaintiff should flee to avoid injury, before he is entitled to recover damages for an assault and battery. If he use ordinary care to prevent injury, and injury ensue from the wrongful act of the defendant, the plaintiff will be entitled to recover.

Per Curiam.—The judgment is affirmed with costs.

W. Garver and J. Robinson, for the appellant.

G. H. Voss, for the appellee.

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&c.

THE STATE OF INDIANA and Others v. SPRINGFIELD TOWNSHIP IN FRANKLIN COUNTY.

6	83
138	83
6	83
138	407
6	83
150	600

The sixteenth section in the several congressional townships in this state was granted by congress to the *inhabitants* of such townships respectively, for the use of schools *therein* and not elsewhere; and the grant was accepted by the state on the terms in which it was made.

By the sale of the sixteenth section in the several congressional townships in this state, under the act of congress of 1828, the proceeds became trust funds, to be applied for the use of schools in such townships respectively, and not elsewhere.

The act of congress of 1828 authorizing the sale of the sixteenth section in the several congressional townships in this state, and the several acts of congress reserving, and also those granting, the sixteenth section in the several townships in this state and other states for the use of schools, being in relation to the same subject-matter, are to be taken in *pari materia* and construed as one act, in ascertaining the purpose of the grant of the sixteenth section of the several townships in this state.

The circumstance that when the sixteenth section in the several townships in this state was granted by congress to the inhabitants for the use of schools therein, there were, in some of the townships, no inhabitants, did not affect the validity of the grant.

A repeal by the legislature of the act creating congressional townships, could not affect the validity of the grant by congress of the sixteenth section in

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&c.

those townships to the inhabitants for the use of schools therein, nor give the state any better right than it otherwise would have had to divert the funds derived from the sale of such sections. The grant in question was a contract executed and incapable of revocation by the legislature.

Semble, that so far as the corporate capacity of the several congressional townships relates to the funds derived from the sale of the sixteenth section in such townships, they are private corporations created to meet the terms of the grant by congress of said sections, and their powers can not be repealed by the legislature.

The school law of 1852, so far as it diverts the proceeds of the sale of the sixteenth section in the several congressional townships from the use of schools in such townships respectively to the use of the school system of the state at large, is in contravention of section 7 of article 8 of the constitution.

Thursday,
December 28.

APPEAL from the *Franklin* Circuit Court.

STUART, J.—Appeal from an order of injunction restraining the auditor, treasurer, and board of commissioners of *Franklin* county, from distributing the income of a certain school fund, alleged to belong to the appellee.

The fund in controversy is the proceeds of the sale of the sixteenth section in *Springfield* township. It is claimed that by the act of congress of *April* 19, 1816, that section was granted in every township "to the inhabitants thereof, for the use of schools." The school law of 1852 treats the township fund as the property of the state, and its income subject to her disposal, for the use of the common school system. The complaint is that the defendants are about to execute the law, and thereby divert the income of the *Springfield* township fund, amounting to 7,423 dollars and 36 cents, from the use of the inhabitants of that township, to the support of schools elsewhere.

The prayer of the complaint is, that the defendants be enjoined, &c.

A temporary injunction was granted, agreeably to the prayer of the complaint. From that decision this appeal is prosecuted.

There are no technical objections raised by counsel on either side. Under the rules of Court, we are thus relieved from taking judicial notice of any formal defects which may exist. We therefore proceed, at once, to the principal matter in controversy.

The act of the legislature, the validity of which is thus questioned, enumerates the several funds which are to be consolidated under the denomination of the "common school fund." First in the list of consolidated funds, is the congressional township fund.

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&c.

Prior to 1852, a separate account was kept with each township. R. S. 1843, p. 254. The income of the fund arising out of the sale of the sixteenth section was expended for the use of schools within the township. Thus the inhabitants of each township enjoyed the income of their own particular fund.

The school law of 1852 contemplates an entire change. *Civil* townships, with different boundaries, are substituted for *congressional* townships. There is no longer to be any congressional township fund recognized. All the separate funds, the township, surplus revenue, saline, bank tax, &c., are united. The fund of each township is thus commingled with those of other townships, and with other school funds. Pamphlet School Law, notes, p. 26. The income arising from the consolidated fund is to be distributed ratably throughout the state for the support of common schools.

In brief, the law diverts the proceeds of the sixteenth section from the use of schools in the congressional township where the land was situated, to the use of the school system of the state at large.

And the only question raised is, Was it competent for the state so to divert the township fund?

The appellants claim that the title to the sixteenth section was vested in the state; and that it is her right to expend the income of the fund upon such system of common schools as she may deem best adapted to diffuse the blessings of education among all classes.

The appellees insist that this diversion of the township fund is in conflict with the acts of congress, and in violation of the constitution of the *United States*.

Counsel on both sides seem to take it for granted that the school law is in accordance with the constitution of the state. The same view of the harmony between the

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law and the constitution prevailed, of course, with the majority of the legislature that passed the act. Many of the leading men who moulded the school law had been prominent members of the constitutional convention. The same opinion seems also to have prevailed in the assembly of 1853. Pamphlet School Law, p. 34.

If this opinion be correct, the question now raised on the school law arises on the constitution itself. To show with what warrant the impression of the accord between the law and constitution is so generally entertained, the eighth article of the latter, and the corresponding sections of the former, are inserted in note 1 at the end of this opinion.

It is not our province to trace the idea of diverting the township fund to its origin; nor to inquire through what channels, legislative or constitutional, that sentiment seemed to run, further than may be useful to elucidate the pending question.

The subject seems to have been broached as early as the session of 1848-9; House Journal, p. 319; and perhaps even earlier. It was also agitated in the constitutional convention. At the session of 1851-2, it came to maturity in the form of the act now under consideration.

If the first four sections of article eight (see note 1) stood alone, qualified only by the clause quoted from section twenty-two of article four, the Court would be divided as to whether the constitution itself did not consolidate, and thus divert, the township fund. But the difficulty seems to be removed by a subsequent section. The seventh section of article eight, whatever its history, or for whatever purpose introduced, enjoins that "All trust funds, held by the state, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created."

On the subject of education, the constitution of 1816, and that of 1851, declare, that education, generally diffused, is essential to a free government. In both its encouragement is enjoined as a duty on the general assembly. The difference seems to be, that the new constitution gives

unity to the school funds, and contemplates a uniform system of common schools as a *state institution*, under an official head. Section 8, article 8, quoted in note 1. It is tacitly assumed, that the wealth of the state should educate the children of the state.

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Hence any enactment which the wisdom of the legislature might devise, to carry out that policy, should receive the favorable consideration of the Courts, unless it clearly conflict with laws of higher obligation. *Fletcher v. Peck*, 6 Cranch 87.—*Newell v. The People*, 3 Selden 9.

Bringing the school law of 1852 to the test of the seventh section of the eighth article of the constitution, let us inquire, what was the purpose for which the congressional township fund was created?

That question must be answered, primarily, by the terms of the grant. When congress granted the sixteenth section, it is to be presumed the purpose of the grant was expressed. Accordingly, the sixth section of the act of April 19, 1816, "to enable the people of the *Indiana* territory to form a constitution," &c., makes the following, among other propositions, which, "if accepted, shall be obligatory upon the *United States*," viz., "that the section numbered sixteen, in every township, and when such section has been sold, granted or disposed of, other lands equivalent thereto and most contiguous to the same, shall be *granted to the inhabitants of such township for the use of schools*." The act is published at length in the revised statutes. 1 R. S. 93.

It is matter of history that these propositions were accepted on the part of the people of *Indiana*, by a solemn ordinance of their constitutional convention. 1 R. S. 95.

In construing language so plain, the only mystery is, how it could ever have given rise to any doubt. With the terms of the grant in view, the very statement of the question seems equivalent to a decision. Had the legislature passed an act consolidating the property of *A.* and *B.*, diverting it from their exclusive use, and providing for the ratable distribution of its income amongst *A.*, *B.*, *C.* and *D.*, the case would not be as strong as this. Yet the un-

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soundness of such legislation, as violating fundamental principles, would not admit of doubt. Every one could see, at a glance, its vicious tendency and dangerous assumptions. That the inhabitants of the respective townships were *quasi* corporations, called into artificial existence by the legislature, and strangled by the same power when their funds were wanted, does not seem either to distinguish the case nor justify the act. The ingenious hypothesis of counsel does not blunt the force of the illustration.

But the great importance of any question affecting so many interests and persons, putting in issue the constitutional action of the legislature, and involving the unity of a school system so elaborate, and claimed to be so complete, demands an extended and careful consideration.

Prior acts of congress throw an additional light on the intention of the grant. The ordinance of *May* 20, 1785, "to ascertain the mode of disposing of lands in the western territory," provided, that "there should be reserved the lot number sixteen of every township, for the maintenance of public schools within the said township."

The act of *March* 26, 1804, making provision for the disposal of the public lands in the *Indiana* territory, (sec. 6), provides that "the section numbered sixteen in every township," &c., "shall be reserved for the use of schools within the same."

Then follows the grant of *April* 19, 1816, *supra*, to the *inhabitants* for the use of schools.

It is not necessary to pause on the single word in the grant which alone tends to give limits and locality to the munificence of congress. That word is *inhabitants*. It is used in the first section of the act of *April* 19, 1816, *supra*, thus: "Be it enacted," &c., "that the *inhabitants* of the territory of *Indiana* be and they are hereby authorized to form for themselves a constitution and state government," &c. Here it defines and limits the right of forming a constitution, &c., to those who inhabit the *Indiana* territory. It excludes, *ex vi termini*, from participation in the rights conferred by the act, all inhabiting beyond those limits. So in the sixth section it is also a term of exclusion.

Those living beyond the limits of the township are excluded from sharing the income of the sixteenth section or its proceeds. The word *inhabitants*, as there used, is of itself sufficiently potent to confine the expenditure of the fund for the use of schools within and for the township.

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The intention of congress is further illustrated by subsequent legislation on kindred subjects, wherein it is observable the word *inhabitants* occurs uniformly and with an obvious purpose.

On the admission of *Illinois* by the act of *April* 18, 1818, and *Missouri* by the act of *March* 6, 1820, a similar grant was made for the same purpose in somewhat different terms, viz., that "section sixteen in every township," &c., "should be granted to the *state* for the use of the *inhabitants* for the use of schools."

The act of congress of *March* 2, 1819, for the admission of *Alabama*, contains the same propositions made to *Indiana*. The grant of the sixteenth section is also in the same terms, viz., *to the inhabitants, for the use of schools*.

Similar grants have been made in all the new states; but these are selected because the grants have received construction in the state Courts.

In 1827, the legislature of *Indiana* applied to congress to extend to the general assembly the power to sell the school lands. The congressional response, passed *May*, 1828, is couched in these remarkable words:

"That the legislature of the state of *Indiana*, shall be and is hereby authorized to sell and convey in fee simple, all or any part of the lands heretofore reserved and appropriated by congress for the use of schools within said state, and to invest the money arising from the sale thereof in some productive fund, the proceeds of which shall be *forever* applied, under the direction of said legislature, for the use and support of schools, *within the several townships and districts of country for which they were originally reserved and set apart, and for no other purpose whatsoever. Provided*, said land or any part thereof shall in no case be sold, without the consent of the inhabitants of such township or district, to be obtained in such manner as the legis-

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lature of said state shall by law direct. And *provided*, also, that in the apportionment of the proceeds of said fund, each township and district aforesaid shall be entitled to such part thereof, and no more, as shall have accrued from the sum or sums of money arising from the sale of the school land, belonging to such township or district."

Vide note 2.

The original impression seems to have been that the lands should be leased, and the rents and profits applied to the use of schools. The policy was to provide a school fund for every locality of six miles, which should be permanent and perpetual. So it seems to have been understood both by congress and the general assembly. R. S. 1824, p. 380. Hence the necessity of obtaining the sanction of congress to the proposed change in the character of the trust.

In this light, the act of *May*, 1828, is to be taken in *pari materia* with other acts on the same subject. Though passed at different sessions of congress, yet as they all relate to the same subject-matter, they are to be taken and construed together as one act. The whole form a body of law from which the purpose of the grant is to be deduced. *Smith* on Statutory and Constitutional Construction, 751.

Thus in 1785 and in 1804, the sixteenth section is *reserved* in each township for the use of schools within the same. In 1816, it is *granted* to the *inhabitants* of such township for the use of schools. In 1828, the sixteenth section may be sold *with the consent of the inhabitants*. It is further provided, as indicative of the original purpose of the grant, that the proceeds be forever applied for the use of schools *within the several townships* and districts of country for *which they were originally set apart*, and for *no other purpose whatever*. The several acts for the admission of *Illinois*, *Alabama* and *Missouri*, further illustrate collaterally the purpose of the grant. In all those enactments the language is clear and explicit. The purpose of congress in granting the sixteenth section is for the benefit of the *inhabitants* of the township in which the section is located. Whether the grant be to the state for the use of

the *inhabitants*, or directly to the *inhabitants*, is, for the present, immaterial. The point of inquiry is the intention and purpose of the grant. In every instance, to whomsoever granted, it is dedicated to a particular use, for the benefit of particular persons. That use is the *schools of the township*; and the persons to be benefited, the *inhabitants of the township* in which the lands are situated.

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Historically, these several acts indicate the settled policy of the government since the period of the first reservation of the sixteenth section in 1785.

If, as counsel contend, the acts prior to 1816 be regarded only as an intimation of future policy; the act of 1816 the completion of that policy; and the act of 1828 simply nugatory; still the latter act, as a legislative exposition of what had been done, would seem to leave nothing wanting to demonstrate the settled purpose of congress in first *reserving* and subsequently *granting* the sixteenth section. The grant for the *schools* and the *inhabitants* of the township *exclusively*, stands unimpaired, and even fortified by that construction.

The purpose of the grant is still further elucidated by the second proposition in the sixth section of the act of April, 1816, *supra*. The salt springs out of which the saline fund arose, is granted to the *state, for the use of the people thereof*. This occurs in the very next sentence after the grant of the sixteenth section; clearly intending to distinguish between the *inhabitants* of the *townships* respectively, in the one grant, and the *people of the state at large*, in the other.

The obvious policy of such a grant may be suggested as an auxiliary consideration in favor of this construction. It was to encourage the settlement of all parts of the state, and thus secure the speedy disposal of the public lands. The same policy has since added the pre-emption laws. A supplemental and higher consideration was, no doubt, the diffusion of knowledge among the people, by laying the basis of a school fund uniformly, every six miles, throughout the state.

It will not be pretended that the sale of the school sec-

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tion, with the consent of the inhabitants, under the direction of the legislature and the sanction of congress, changed the purpose of the grant. The terms upon which congress authorized the sale are too explicit to leave room for mistake. Act of *May*, 1828, *supra*. Instead of a trust estate, it became, by the sale, "trust funds." It is in this light that the new constitution (s. 7, art. 8, quoted in note 1, *infra*), contemplates them as trust funds; and enjoins on the general assembly their faithful and exclusive application to the "purposes for which the trust was created."

Such being the history and purpose of the grant on the part of the *United States*, it is pertinent to inquire, in the next place, how the grant has been treated by the state of *Indiana*.

The convention that framed the constitution of 1816, for themselves and their posterity, accepted the propositions of congress. Among these propositions, we have seen, was the grant of the sixteenth section. They were accepted in the very terms of the grant, without any qualification whatever. 1 R. S. 95. This solemn ordinance would alone seem sufficient. It is consecrated by adherence to its terms for a period far beyond the generation that gave it birth. The men of that day seemed to have no idea that its solemn obligations would ever sit lightly on their posterity. There is no allusion to any such contingency. They made no provision for weighing fanciful considerations of expediency against the plighted public faith. To them belongs the honor of enjoining upon the general assembly "to provide by law for a general system of education, ascending in regular gradation from *township schools* to a state university, wherein tuition shall be gratis and equally open to all." Constitution of 1816, art. 9, s. 2.

Under this constitution and the laws made in pursuance of it, the school system was managed up to the taking effect of the school law of 1852.

The practical exposition of the grant by the state government for a period of over thirty-six years, can not fail to have its weight. During all that time the school section and the township fund arising from the sale of it, were

administered for the use of schools within the township, in accordance with the universal understanding of the terms of the grant. The purpose of the grant was repeatedly recognized by the assembly, often in the very language of the grant itself.

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Without stopping to analyze all the state legislation on the subject, a few instances must suffice. Thus in *January*, 1828, the proceeds of the sale of the sixteenth section are directly recognized as "a school fund, *to be forever applied to the use of the inhabitants of the respective townships in the support of schools therein,*" &c. A similar recognition is made in the school laws of 1831, 1833 and 1838. Further, the faith of the state is repeatedly pledged to the inhabitants of each township for the preservation of such of the funds belonging thereto as are controlled by the state, and for the payment of the annual interest thereon to the *townships properly entitled to receive the same*. R. S. 1831, p. 468.—Acts of 1833, p. 88.—R. S. 1838, p. 522.

From that period up to the session of the assembly of 1851–2, though the subject of diverting the fund was agitated, as we have seen, the whole tenor of legislation is a continued recognition of the rights of the inhabitants to the exclusive use of the congressional township fund. R. S. 1843, c. 13, art. 8, p. 253.—*Id.*, p. 261.

Even as late as 1849, when many radical changes were introduced in the mode of administering the trust, the township fund remained unimpaired. The legislature carefully guarded against any misconstruction as to the integrity of the fund. It is done in these memorable words, evincing a full knowledge of the history and purpose of the grant, as well as a just appreciation of the sacredness of the trust. "Provided, that nothing herein contained shall be so construed as to *divert* the fund commonly called the congressional township fund, or any part thereof, from the objects and purposes for which it was created by congress." Gen. Laws 1849, p. 125.

That recognition alone, thirty-three years after the grant, might, it should seem, suffice. Such intelligent appreciation of a public duty, in the administration of a public

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trust, is grateful to contemplate. It outweighs a world of visionary theories which would place any fancied expediency above the public faith; or inaugurate a new era in education by an act which it is not easy to distinguish from a breach of public trust.

The executive officers of the government, under all the phases of the school law, recognized, within their proper spheres, the rights of the inhabitants to the income of the township fund.

Even the Courts added the weight of their authority in the same direction. "The grant," says judge *Sullivan*, "by the act of congress of 1816, of the sixteenth section, is not to the state, but to *the inhabitants* of the township in which the section lies." *The State v. Newton*, 5 Blackf. 455.

So in *Missouri*. In *The State v. Dent*, though the grant was to "the state, for the use of the inhabitants, for the use of schools," yet her own Courts regard the state as a mere trustee for the *inhabitants*. 18 Missouri R. 313. So, also, the same Court in *Butler v. Chariton County Court*, 13 *id.* 112.

A question somewhat similar came before the Supreme Court of *Ohio* in relation to what is called the "ministerial sections." In the sale of lands by the *United States* to the *Ohio Land Company*, and to one *Symmes*, section sixteen in every township was reserved for the use of schools, and section twenty-nine for the use of religion in the township. The sections thus reserved for religious purposes were denominated the "ministerial sections." It was held that the fund derived from the sale of the "ministerial sections" was intended for the support of religion in the township in which the section was located; and could not be diverted to any other purpose, or for the support of religion in any other place. *The State v. The Trustees, &c.*, 11 Ohio R. 24.

In *Morton v. The Granada Academy*, it was held, that the school sections numbered sixteen are trust property for the benefit of the whole township in which they are situated; and that the legislature has no power to divert them from that purpose. 8 Smedes and Marsh. 773.

We are cited by the appellants to several decisions of the Supreme Court of *Illinois* for a different purpose, in regard to which we would be slow to admit the doctrine to the extent it is there pressed. But these very decisions are directly in point on the question we are now considering, viz., the power of the legislature to divert the fund. In *Bush v. Shipman*, it is held, that though the grant is to the state for the use of the *inhabitants, &c.*, yet as a matter of good faith the effects of the township should be secured for the use of those for whom they were donated. 4 Scam. 186.

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Long v. Brown is also cited to a point, (the title,) in which it is opposed by the authority of our own Court in 5 Blackf. 455, *supra*, and directly overruled in the *Vincennes University* case, 14 How. 268. But on the point we are now considering, it is good authority, and consistent with the case in *Howard*. It is there declared that the sixteenth section is held by the state in perpetuity for the use and benefit of the inhabitants of the proper township. 6 Alabama R. (New Series) 622.

On the same point, judge *McLean*: "The citizens within the township are the beneficiaries of the charity. The title to these lands has never been considered in the state; and it has no inherent right to appropriate them to any other purpose than for the benefit of schools. For the exercise of the charity under the laws, the title is in the township." *The Trustees of the Vincennes University v. The State of Indiana*, 14 How. 268.

The dissenting opinion of *Taney*, C. J., does not favor the diversion of the fund. "The reservation of the school sections undoubtedly dedicated them to the uses for which they were reserved; and they can not be appropriated by the state to any other purpose. But congress alone has the power to designate the body by whom the trust should be administered." 14 How., *supra*.

So that whether the one opinion or the other be adopted, the result is the same. Both agree that the fund can not be appropriated by the state to any other purpose; that

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the trustee has no power to divert it from the specific purposes for which the trust was created.

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The supervision exercised by the legislature over the township fund is but an implied necessity sanctioned by congress. It extends only to protecting and administering, not diverting, the fund.

It but remains to inquire, Does the school law of 1852 faithfully and exclusively apply that fund to the purposes for which it was created? We are clearly of opinion that it does not. The operation of the law is to distribute to the people of the state at large a school fund created for the exclusive use of the inhabitants of *Springfield* township.

To that extent the law is in violation of the seventh section of article eight of the constitution, and therefore void.

We have not been careful to inquire how far the school law of 1852 may conflict with the constitution of the *United States*. It is sufficient that it conflicts with the state constitution. The laws of congress have therefore been examined solely with a view to ascertain the intention of the grant.

It is urged that in most of the townships there were not at the time any *inhabitants*. But at common law, land may be granted to *pious* uses before there is a grantee in existence competent to take. 14 How., *supra*.—*The Presbyterian Church, &c.*, v. *Williams*, 1 Ohio State R. 478. In the meantime, the fee will be in abeyance. *Story*, J., in *The Town of Paulet v. Clark*, 9 Cranch 292. These school lands donated to *charitable* uses fall within the same reason, and are governed by the same rule.

It is further insisted that the *congressional* townships were mere municipal corporations, existing at the will of the legislature; and that the act creating *civil* townships, with corporate powers, repealed by implication the former acts.

But even if this position were admitted, it is not perceived how it could inure to the benefit of the state, or give her any better right to divert the township fund. The

property of the deceased does not ordinarily fall to the party who gave the fatal blow. The artificial person created by the state may have been brought to an untimely end by the same power. But the effects of the defunct corporation do not thereby escheat. The inhabitants still remain. They are "the beneficiaries of the charity." The grant once made to the inhabitants can not be invalidated. It is a contract executed, which even the sovereign power can not revoke. *Fletcher v. Peck*, 6 Cranch 87.—*Terrett v. Taylor*, 9 Cranch 43.—*The Town of Pawlet v. Clark*, 9 Cranch 295. Besides, by the act for the incorporation of *congressional* townships, the general assembly vested the lands, reserved by congress for the use of schools, in each congressional township, *in the corporations thereof*. R. S. 1824, p. 380. She is therefore within the rule in *Cranch, supra*, even if she ever had a shadow of title to dispose of.

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Hence, admitting the demise of the corporations, the state is not entitled to the school fund; nor released from her duty as trustee to administer it faithfully and exclusively for the benefit of the *inhabitants*.

So far as these corporations may have been invested with political power or participated in the administration of municipal affairs, the position of the appellants is undoubtedly correct. The legislature could recall such power at pleasure. There is no vested right in corporate franchises created for public purposes. But so far as their corporate capacity related to the fund of which the inhabitants were the beneficiaries, it presents a very different question. To that extent they are, perhaps, embraced within the rule in the *Dartmouth College* case, 4 Wheat. 518. They would seem to be private corporations created to meet the terms of the grant. Acts of 1817, p. 104.—Acts of 1818, p. 301.—R. S. 1824, p. 379.—R. S. 1831, p. 463.—Acts of 1833, p. 78.—R. S. 1838, p. 509.—R. S. 1843, p. 306.

Since the state can not, in any event, divert the fund, it would not become her, if she could, to repeal the corporate powers of the inhabitants, and thus embarrass the administration of the school funds. She would not thus need-

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lessly compromise her dignity and good faith, by assuming a hostile and unnatural attitude to any portion of her citizens. She should rather confer on them increased facilities to administer their school funds efficiently.

It is urged in argument that the ruling indicated would be a deadly blow to the common school system of *Indiana*. We do not so regard it. We should be slow to believe that human ingenuity has been exhausted in the concoction of an unconstitutional enactment. However that may be, the responsibility does not lie with the judiciary. If the legislative department will impinge on the constitution, the duty of the Courts may be arduous and unpleasant, but it is a plain one, regardless of consequences.

As there are no disputed facts to be adjudicated, only the single question of law involved, we see no necessity for remanding the cause for further proceedings.

Per Curiam.—It is therefore ordered that the *Franklin* Circuit Court make the injunction granted in this cause perpetual.

J. D. Howland, for the appellants.

G. Holland, for the appellee.

(1) The following is the eighth article of the constitution in relation to "Education:"

"SECTION 1. Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all.

"SEC. 2. The common school fund shall consist of the congressional township fund, and the lands belonging thereto;

"The surplus revenue fund;

"The saline fund and the lands belonging thereto;

"The bank tax fund, and the fund arising from the one hundred and fourteenth section of the charter of the state bank of *Indiana*;

"The fund to be derived from the sale of county seminaries, and the moneys and property heretofore held for such seminaries; from the fines assessed for breaches of the penal laws of the state; and from all forfeitures which may accrue;

"All lands and other estate which shall escheat to the state for want of heirs or kindred entitled to the inheritance;

"All lands that have been, or may hereafter be, granted to the state, where no special purpose is expressed in the grant, and the proceeds of the sales

thereof; including the proceeds of the sales of the swamp lands, granted to the state of *Indiana* by the act of congress of 28th *September*, 1850, after deducting the expense of selecting and draining the same;

"Taxes on the property of corporations, that may be assessed for common school purposes.

"SEC. 3. The principal of the common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of common schools, and to no other purpose whatever.

"SEC. 4. The general assembly shall invest, in some safe and profitable manner, all such portions of the common school fund as have not heretofore been entrusted to the several counties; and shall make provision, by law, for the distribution, among the several counties, of the interest thereof.

"SEC. 5. If any county shall fail to demand its proportion of such interest, for common school purposes, the same shall be re-invested for the benefit of such county.

"SEC. 6. The several counties shall be held liable for the preservation of so much of the said fund as may be entrusted to them, and for the payment of the annual interest thereon.

"SEC. 7. All trust funds, held by the state, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created.

"SEC. 8. The general assembly shall provide for the election, by the voters of the state, of a state superintendent of public instruction; who shall hold his office for two years, and whose duties and compensation shall be prescribed by law."

The twenty-second section of the constitution, so far as it relates to common schools, is as follows:

"SEC. 22. The general assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say:

"Providing for supporting common schools, and for the preservation of school funds," &c.

The school law has been published in pamphlet form, with notes, &c., by the superintendent of public instruction. At page 26, the second section, embracing the consolidation feature, is thus introduced:

"SEC. 2. By this section, all common school funds, from whatever source derived, are consolidated in one general and common fund, to be called the 'common school fund.' The county officers need therefore no longer keep on their books the several classes of public funds distinct."

Then follows the act, the first four sections of which are as follows:

"An act to provide for a general and uniform system of common schools, and school libraries, and matters properly connected therewith.

"SECTION 1. Be it enacted by the general assembly of the state of *Indiana*, That there shall be annually assessed and collected, as the state and county revenues are assessed and collected; first, on the list of property taxable for state purposes, the sum of ten cents on each one hundred dollars.

"SEC. 2. The funds heretofore known and designated as the congressional township fund, the surplus revenue fund, the county common school fund, and all funds heretofore appropriated to common schools, the saline fund, the bank tax fund, shall, together with the fund which shall be derived from the sale of

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the county seminaries, and the property belonging thereto, from the fines assessed for breaches of the penal laws of the state, and from all forfeitures which may accrue, all lands and other estates which shall escheat to the state for want of heirs or kindred entitled to the inheritance, all lands which have been or may hereafter be granted to the state, where no special purpose is expressed in the grant, and the proceeds of the sales thereof, including the proceeds of the sales of the swamp lands granted to the state of *Indiana* by the act of congress of 28th *September*, 1850, and deducting the expense of selecting and draining the same, the taxes which may from time to time be assessed upon the property of corporations for common school purposes, the fund arising from the one hundred and fourteenth section of the charter of the state bank of *Indiana*, and unreclaimed fees as provided by law, shall be denominated the common school fund, the income of which, together with the taxes mentioned and specified in the first section of this act, shall be applied to the support of common schools.

"SEC. 3. The several counties of this state shall be held liable for the preservation of said fund, and the payment of the annual interest thereon, at the rate established by law.

"SEC. 4. Each civil township in the several counties of this state, is hereby declared a township for school purposes, and the trustees of such township are hereby declared to be trustees also for school purposes, and their clerk and treasurer shall be the clerk and treasurer for school purposes also."

(2) This article is a literal copy, *mutatis mutandis*, of the prior act of congress of *February*, 1826, authorizing the state of *Ohio* to sell the school lands, and of the act of *March*, 1827, giving the same authority to *Alabama*.

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It is no objection to interrogatories submitted to the jury for the purpose of a special verdict that they are leading.

Where a special verdict ascertains facts which are clearly sufficient to support the judgment, irrespective of other facts in relation to which an instruction is asked for and refused, the refusal of the instruction is unimportant.

Where an instruction is asked for in relation to evidence, which is not applicable to the facts proved, it may properly be refused.

The Court has no authority, in granting a divorce to a wife, to set off to her any part of the real estate of her husband.

Alimony can only be allowed to the wife in money.

A suit for a divorce, on behalf of the wife, was submitted for trial to a jury, who, by their verdict, found that the plaintiff was entitled to a divorce, and also ascertained the value of the husband's real estate, and set off a third of such real estate to the wife. Judgment accordingly. The Supreme Court

6	100
140	562
6	100
145	59

reversed the judgment below setting off to the wife a third of the real estate, but instructed the Court below, under ss. 569 and 570, 2 R. S. 1852, p. 161, to render a judgment against the husband, instead thereof, to the amount of the value of one-third of his real estate as ascertained by the jury.

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APPEAL from the *Cass* Circuit Court.

PERKINS, J.—*Julia M. Rice* filed in the *Cass* Circuit Court a complaint against *Gilbert J. Rice*, her husband, charging, after stating residence, marriage, &c., a long course of cruel treatment generally, and specifying certain particular acts; averring that, in consequence, she had separated from him never to return; praying a divorce, custody of children, &c., and alleging that her husband was possessed of certain property, &c.

The defendant answered, admitting the marriage, residence in the state, property, &c., but denying the cruel treatment, &c., the gravamen of the complaint.

For the trial of the issue, he demanded a jury, who were impaneled, sworn, &c., and who, at the request of the plaintiff, returned a verdict in response to interrogatories propounded by the Court, covering and reducing to points the charges contained in the complaint.

The verdict was both general and special. It found that there should be a divorce, and set forth the facts proved as the basis of the finding. It also found that the defendant was not a suitable person to have the custody of the children, and that the plaintiff was; and, in answer to the twenty-third interrogatory, which reads—"If the jury find for the plaintiff, what alimony do they assess in her favor?" they said they found for the plaintiff, and that, for alimony, she should have, in addition to one-third of her husband's real estate, the sum of 200 dollars. They returned the value, in money, of his real estate, with the amount of incumbrances upon it.

The Court decreed a divorce, that the plaintiff should have the custody of the children, be paid the 200 dollars, and have set off to her the one-third of the real estate, &c.

The Court, on the trial, gave the following instruction to the jury, to which the defendant excepted:

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"A wanton and unfounded charge of adultery made by the defendant to the plaintiff, if you find such to have been made, may itself constitute a cause of divorce."

The Court refused to give this instruction, viz.:

"The conduct necessary to constitute cruel treatment must be not only habitual and continuous, but it must be aggressive in its character. Mere indifference or inattention of a husband, not accompanied with an omission to provide the necessaries of life, although habitual, can not of themselves constitute cruel treatment."

The defendant below, the appellant in this Court, insists that the Court erred on the trial—

1. In propounding the interrogatories to the jury in a leading and otherwise improper form.

2. In giving the instruction first above copied to the jury.

3. In refusing to give that secondly above copied.

4. In decreeing that one-third of the defendant's real estate should be set off to the plaintiff in the complaint.

The objection urged by counsel to the interrogatories put by the Court to the jury, does not strike us with much force. These interrogatories were more numerous than was necessary, some of them, perhaps, frivolous, and not propounded in the most happy manner; still there were a sufficient number, framed after the usual manner in such cases, to cover the ground necessary to a divorce; and the jury having found for the plaintiff below on them, the others may be regarded as insignificant surplusage. The leading form of the questions does not strike us as objectionable. They are not to be tested by the rule of putting questions to witnesses. A witness is called to state what he knows, what he can prove between the parties; the jury is then to respond to the question, what has he proved? So, upon the whole case. The plaintiff makes a charge against the defendant, and asks, on its being shown to be true, that a certain judgment shall be rendered against him. The truth may be shown by the admission of the defendant, and, in that case, proof is, in ordinary cases,

unnecessary. But when the defendant denies the charge, the burden falls upon the plaintiff to prove it; and after he or she has made the attempt by introducing such evidence as may be available, the question arises with the jury, is the charge proved? has the plaintiff established this fact, and that fact, and all the facts necessary to make good the case?

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The practice corresponds to this view.

The following are the questions propounded, and the responses returned, constituting the verdict, in the celebrated *Forrest* case, before chief justice *Oakley*, of the Superior Court of the city of *New-York*:

"1st. Has or has not the defendant, *Edwin Forrest*, since his marriage with the plaintiff, *Catharine N. Forrest*, committed adultery as in this complaint charged?

"*Answer*—He has.

"2d. Were or were not the said plaintiff and defendant both inhabitants of this state at the time of the commission of such adultery by said defendant?

"*Answer*—They were.

"3d. Was or was not such adultery committed by said defendant within this state?

"*Answer*—It was.

"4th. Was or was not the said defendant a resident of the state of *New-York*, at the time of the commencement of this action?

"*Answer*—He was.

"5th. Has or has not the said plaintiff committed adultery, as alleged against her in the answer in this action?

"*Answer*—She has not.

"6th. Was or was not the plaintiff a resident and inhabitant of this state at the time of the commencement of this action?

"*Answer*—She was.

"7th. Was or was not the plaintiff an actual inhabitant of this state at the time of the commission of such adultery by the defendant within the state, and also at the commencement of this action?

"*Answer*—She was.

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"8th. What amount of alimony ought to be allowed annually to the said plaintiff?

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"*Answer*—Three thousand dollars.

"The jury say, that they find for the plaintiff on the whole issue in the pleadings, and that in answer to, they find in the affirmative on the 1st, 2d, 3d, 4th, 6th and 7th questions of fact specified in the order of *December 24th*; and in the negative on the 5th question of fact specified in the said order; and that the alimony to be allowed the said plaintiff shall be three thousand dollars per year. *January 24, 1852. (Signed,) Stephen W. Meech, Foreman.*"

The question was raised, in the Supreme Court of the state of *New-York*, upon this practice of addressing interrogatories to juries, and received consideration in the case of *McMasters and Bruce v. The Westchester County Mutual Insurance Company*, 25 Wend. 379. The practice was approved of. The questions put in that case are given in the report, are all directly leading, and, says *Nelson, C. J.*, in delivering the opinion of the Court, are in accordance with the practice on the circuits in the state, and unobjectionable.

2. The instruction given by the Court and objected to, seems to us to be correct, but it is not necessary that we should so decide; for the verdict, showing the facts proved, presents abundant ground for the divorce, irrespective of the particular charge named in the instruction, and hence that becomes, in considering the case in this Court, unimportant.

3. In regard to the instruction refused, we may remark—

First. The Court might well have refused it, because it did not assume the facts as proved, and was not, therefore, applicable to the case made. That instruction rests upon the assumption that the evidence proved nothing more than mere silent neglect, and that assumption is not true. For example, questions ten, thirteen and fourteen are, in substance, has the defendant, during the coverture of the parties, in sickness and in health, habitually insulted, vexed, and harassed his wife? And the jury respond that he has. Here is something more than mere indifference, something

bordering, we think, very closely upon the aggressive, and showing that the instruction asked did not correspond with the facts proved, and would have been calculated to mislead.

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Secondly. We may remark of this instruction that it seems to contemplate an entirely physical, sensual view of the marriage relation; and if that relation has no aim to the social happiness and mental enjoyments of those united in it, the instruction should have been given. But if it is otherwise, if it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then, we think, that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief. And, in point of fact, we have no doubt that mere cold neglect, such as is assumed in the instruction, has sent broken-hearted to the grave hundreds of wives, where the dagger, poison, and purposed starvation have sent one. Men generally supply a sufficiency of food to their brute animals.

4. The decree setting off one-third of the real estate to the wife was erroneous. No statute authorizes it. Section 20, 2 R. S. 1852, p. 237, enacts that "a divorce decreed on account of the misconduct of the wife, shall entitle the husband to the same rights, so far as *his* or *her* real estate is concerned, as he would have been entitled to by her death;" but, very singularly indeed, and repugnant to the whole spirit of our modern legislation on the subject, a similar provision is not made, in behalf of the wife, in respect to the property of the husband, on a divorce for his fault; and alimony is not granted in real estate, but in money, as our statute provides. Section 19, 2 R. S., *supra*, declares that the Court shall make such other decree for alimony as the circumstances of the case, the pecuniary condition of the parties, &c., shall render just and proper; and section 22, p. 237, enacts that it shall be for a sum in gross. Still, in this case, the jury found facts that would

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have enabled the Court to render a proper decree; they found that the real estate of the defendant below, was worth a fraction over 13,000 dollars, that it was incumbered to the amount of about 4,000 dollars, that he had personal property of the value, &c., and that, on the granting of the divorce, the wife should have one-third of the real estate, and 200 dollars over. Here were all the facts, all the elements necessary to the rendering of a decree, according to the intention and verdict of the jury. The Court had only to take one-third of the value, as found, of the real estate, add to that sum 200 dollars, and make that the amount of the alimony. These facts all appear in the record, and, such being the case, the duty of this Court, in the premises, is indicated by sections 569 and 570, 2 R. S., p. 161, which provide that the Supreme Court may reverse or affirm judgments below in whole or in part; and when reversed, in whole or in part, if no new trial is required, may remand the cause, "with particular instructions relative to the judgment to be rendered, and all modifications thereof."

Under these sections, we affirm the decree for the divorce, with the return of certain articles of property to the wife, &c., and that the plaintiff below recover as alimony one-third of the value of the real estate, and 200 dollars, with costs, &c.; and reverse that part of the decree, and only that part, setting off one-third of the real estate specifically, and we shall hereinafter direct a modification of the decree upon that point.

The real estate, as we have said, was found to be of the value of a fraction over 13,000 dollars, and incumbered to the amount of 4,000 dollars. It is not shown whether those incumbrances are anterior or posterior to the marriage, nor whether they are, for any cause, operative against the wife; hence, perhaps, the verdict would authorize the assigning to her one-third of the actual value of the lands; but we think it safer, and more equitable, to throw the doubt against the plaintiff, who might and should have removed it, and deduct the incumbrances, giving the wife one-third of the residue.

The amount will be arrived at thus:		Nov. Term,
Total value of real estate,.....	\$13,000	1854.
Incumbrances,	4,000	GRAVES
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		SKEELS.
Balance,.....	\$9,000	
One-third of this sum,.....	3,000	
Two hundred dollars in addition,.....	200	
Total alimony to be given,.....	\$3,200	

As to the payment of the alimony, section 22, *supra*, provides that the Court, in its discretion, may give a reasonable time for its payment, by instalments, on sufficient surety being given. We think these instalments should be, 200 dollars in hand, 500 dollars in six months, 500 dollars in one year, 1,000 dollars in eighteen months, and 1,000 dollars in two years, all with interest, on sufficient surety, &c., and that the same be charged as a lien upon the defendant's real estate.

STUART, J., was absent.

Per Curiam.—This cause is remanded to the Court below, with instructions to modify the decree as above indicated; and it is considered that the appellee recover her costs in this Court.

L. Chamberlain, Z. Baird, H. P. Biddle, B. W. Peters and J. M. La Rue, for the appellant.

D. D. Pratt and S. C. Taber, for the appellee.

GRAVES and Others v. SKEELS, for the use of PATRICK.

To a *scire facias* to revive a judgment after the defendant's death, and to obtain execution thereon against his real estate, the administrator and heirs of the defendant, if he died intestate, are proper parties.

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The judgment for the plaintiff upon the *scire facias* should be, to make the money first of the assets in the hands of the administrator, and failing in this, then of the lands of the heirs.

But the failure to render the judgment in this form is a mere informality, which, by the R. S. 1852, is to be regarded as amended in the Supreme Court.

A *scire facias* to revive a judgment was substantially as follows: The state of Indiana, to the sheriff of Vigo county, greeting: Whereas A. B., for the use of C. D., on, &c., in the Vigo Circuit Court, recovered a judgment against E. F. in a certain action of debt, to-wit, &c., (mentioning the amount of the judgment); and whereas, afterwards, and before execution thereupon had, to-wit, on, &c., said E. F. died intestate, and letters of administration were granted in due form to G. H.; and whereas said E. F. left as his heirs and terre-tenants I. J. (and others, naming them); and whereas, said judgment remains unsatisfied, as we are informed by said C. D.; we therefore command you to make known to said G. H., as such administrator, and the said I. J. (and the other heirs, naming them,) and the terre-tenants, if there be any, that they appear before the judges of said Vigo Circuit Court, on, &c., to show cause, if any they have, why the said A. B., for the use, &c., ought not to have execution of the goods, &c., of said E. F., in the hands of said G. H. to be administered, and of the lands, &c., of which said heirs are seized as the heirs of said E. F., deceased, for his debt and damages and costs aforesaid, and further to do, &c. The *scire facias* not having been demurred to, held that it was sufficient on error.

Saturday,
January 6.
1855.

APPEAL from the Vigo Circuit Court.

PERKINS, J.—*Scire facias* to revive a judgment. The writ of *scire facias* was as follows:

"State of Indiana, county of Vigo, ss. The state of Indiana to the sheriff of Clay county, greeting: Whereas Jeduthun Skeels, for the use of Joseph Patrick, on the ninth day of November, in the year 1840, in the Circuit Court within and for the said county of Vigo, recovered a judgment against John Graves in a certain action of debt, to-wit, his debt of 308 dollars, and 36 dollars and 70 cents damages, and 3 dollars and 64 cents costs, making in all 348 dollars and 34 cents, as to us appears of record; and whereas, afterwards, and before execution thereupon had, to-wit, on the — day of May, 1842, the said John Graves died intestate, after whose death letters of administration were granted in due form of law to Elias Bowlin; and whereas the said John left, as his heirs and terre-tenants, Samuel Graves, James Douglass and Nancy Douglass, formerly Nancy Graves, James Graves, Rebecca Graves, Mar-

garet Graves, Noah Graves, John W. Graves, Sarah E. Graves, Jesse Graves, and Mary J. Williams, formerly Mary J. Graves, and John Williams, her husband; and whereas the said judgment remains unsatisfied, as we are informed by the said Joseph Patrick, we therefore command you that you make known to the said Elias Bowlin, as such administrator, and the said Samuel Graves, [naming also all the other heirs,] and the terre-tenants, if there be any, that they appear before the judges of said Circuit Court in and for said county of Vigo, on the first day of their next term, to show cause, if any they have, why the said Jeduthun Skeels, for the use of Joseph Patrick, ought not to have execution of the goods and chattels of the said John Graves, in the hands of the said Elias Bowlin yet to be administered, and of the lands and tenements of which the said heirs are seized, as the heirs of the said John Graves, deceased, for his debt and damages and costs aforesaid, and further to do," &c.

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1854.

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SKEELS.

The writ was returned by the sheriff served on *Elias Bowlin*, and several of the defendants, and not found as to others, and an alias *scire facias* was issued to *Putnam* county, where service was obtained upon the remainder.

After continuances, at a regular term of the Court, the adult defendants were defaulted, a guardian *ad litem* was appointed, and appeared and answered for the infants, the cause was heard, and, says the record, "the evidence herein being submitted to the Court, and the Court being fully advised, it is considered by the Court that said judgment in said *scire facias* be revived," &c. The residue of the judgment is not, as it should have been, that execution be first levied of the goods, &c., of the administrator, and, for any deficiency, &c., of the lands of the heirs.

It is objected that the proceeding against the administrator and heirs jointly is erroneous; that the judgment against the heirs is erroneous; that the *scire facias* does not charge that the heirs inherited lands, and is otherwise defective.

The proceeding jointly against the administrator and heirs to obtain revivor and execution, is correct. *Bryer*

Nov. Term, 1854. *v. Chase*, 8 Blackf. 508.—*Welborn v. Jolly*, 4 *id.* 279.—
 2 R. S., p. 181, s. 642. But the judgment should be, as
 BOWEN we have intimated, to make the money first of the assets
 v. in the hands of the administrator, and, failing of this, then,
 JOHNSON. &c. But an informality of this kind will not occasion the
 reversal of the judgment. Section 580, 2 R. S., p. 162,
 enacts that "no judgment shall be stayed or reversed, in
 whole or in part, by the Supreme Court, for any defect
 in form," &c., "but such defects shall be deemed to be
 amended in the Supreme Court," &c. And see *Saxton v.*
The State, 8 Blackf. 200.—*Alden v. Barbour*, 3 Ind. 414.

We think the *scire facias* sufficient on error, it not
 having been demurred to below. We presume the proof
 supplied defective allegations.

Per Curiam.—The judgment, as amended in this Court
 pursuant to the statute, is affirmed with costs.

J. P. Usher, for the appellants.

BOWEN and Others v. JOHNSON and Another (1).

The conveyance by a testator of all the land owned by him at the time of
 making his will, operates to revoke it, and those after acquired do not pass
 by the will.

Section 4, p. 485, R. S. 1843, applies only to cases where the will purports to
 devise all the property equally, or in proportions, to all the devisees named
 in it, and not to cases where particular pieces of property are devised to
 particular devisees with a residuary clause.

Thursday,
 July 18, 1850.

APPEAL from the *Fountain* Circuit Court.

PERKINS, J.—This was an application by a part of the
 heirs of *John Johnson*, deceased, against his remaining
 heirs, for partition of the real estate of which he died
 seized. The facts of the case are these:

On the 28th of *December*, 1830, said *John Johnson* made

his will, by which he devised to *John H. Johnson*, his grandson, the north half of lot 126 in the town of *Lafayette*; and all the rest and residue of his estate real to *William H. Johnson* and *John W. Johnson*. Afterwards, and prior to 1836, said *John Johnson* sold all the real estate he possessed at the time of making said will, and in *October*, 1836, with money derived from said sale, purchased other lands, being those of which partition was sought by the present application. Said *Johnson* departed this life on the 20th of *May*, 1847, never having altered said will.

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1854.

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William H. and *John W. Johnson* claim the whole of the lands of which said *John Johnson* died seized, under the residuary clause in the will, and hence resist the partition of them among his heirs generally.

By the *English* law the conveyance of all the land owned by the testator at the time of making his will, would have operated as a revocation of it, and those after acquired would not, by that law, have passed by the will set up in this proceeding. We have, however, the following statutory provision, which, it is claimed, governs this case, and gives the after-acquired lands of the deceased, *Johnson*, to the residuary devisees. It is on page 485 of the R. S. 1843, and is as follows: "Sec. 4. Every devise that shall be made by a testator in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death."

We do not think this section applicable to the case before us. We think it applies only to cases where the will purports to devise all the property equally, or in proportions, to all the devisees named in it; and not to cases where particular pieces of property are devised to particular devisees, with a residuary clause. We think that this construction will best promote justice, and is not inconsistent with the words of the statute.

Such being the case, the lands in question in this suit should be partitioned among the heirs according to the rules of descent.

Nov. Term, *Per Curiam*.—The decree is reversed with costs. Cause
1854. remanded, &c.

BOWEN *J. A. Wright, E. W. McGaughey and A. A. Hammond, for*
v. the plaintiff.
JOHNSON.

W. P. Bryant and A. L. Roache, for the defendant.

(1) The opinion delivered in this case was accidentally omitted by Mr. Carter, and should have appeared in 1 Ind. Reports; and it is here inserted for the convenience of the profession.

END OF NOVEMBER TERM, 1854.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1855, IN THE THIRTY-NINTH
YEAR OF THE STATE.

SHOOK and Others *v.* THE STATE, on the relation of
STEVENS, Auditor, &c.

Nihil debet is bad in debt on a bond.

The board of commissioners, treasurer, auditor, or any other officer who was charged by the R. S. 1843 with the duty of protecting and preserving the surplus revenue fund, was a proper relator in a suit on a bond given to secure a loan from that fund.

In a suit on a surplus revenue bond, an allegation in the declaration that the suit is brought "for the use of the surplus revenue fund," is mere surplusage.

The pleader, in a suit on four surplus revenue bonds, (which contained a stipulation that in case of a failure to pay any instalment of interest, the principal should become due and collectable, &c.,) stated the action to have accrued upon the non-payment of the annual instalments of interest; but the action was not brought until the principal on the last of the several bonds was due, and there was a breach to each count in which the non-payment of the bond was averred. *Held*, that the defect, if any existed, was cured by the breaches last named.

The surplus revenue fund belongs to the *United States*, but is held in trust by the state, who is the legal custodian thereof; and the averment, in a suit on a bond to that fund, that the bond had not been paid to the state, is sufficient.

A defect in the mere form of a declaration can not be examined on demurrer to a defective plea.

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The R. S. 1843 allowed interest to be taken on loans of the surplus revenue, at the rate of 7 per cent. per annum in advance; and the statute fixing the rate of interest generally, and defining the offence of usury, expressly excepted from its operation those provisions of law which related to the loaning of the trust funds of the state.

The bonds declared on in this case were substantially in the form prescribed by the statute to be taken on loans of the surplus revenue, and there was no averment in the pleas that they were made upon any other consideration. *Held*, that the presumption was that they were given for money borrowed from that fund.

To a declaration upon an instrument which does not appear on its face to be usurious, a plea of usury must allege that an excess of interest was reserved with a corrupt intent.

An agreement with the principal to enlarge the time for the payment of a debt, must be founded upon a consideration, in order to discharge the surety.

An instruction is right, if correct in its application to the evidence, although it might be erroneous as an abstract proposition.

It appeared in evidence, in the present case, that the bonds sued upon were given to settle a defalcation of the principal as agent of the surplus revenue fund, and they were made in the form required upon loans, to become due at future periods, with interest payable annually. *Held*, that the jury had a right to treat them as evidence of a loan.

Monday,
May 28, 1855.

ERROR to the *Ripley* Circuit Court.

GOOKINS, J.—Debt on four writings obligatory under seal, dated *January* 23, 1845, one for 100 dollars, due *January* 23, 1846; one for 100 dollars, due *January* 23, 1847; one for 100 dollars, due *January* 23, 1848; and one for 387 dollars and 42 cents, due *January* 23, 1850. These obligations were made by *David P. Shook*, *Peter Shook*, and *Hezekiah Shook*, sen., payable “to the state of *Indiana*, for the use of the surplus revenue fund of the county of *Ripley*.” They were joint and several, and conditioned for the payment of 7 per cent. interest per annum in advance, from date, with a stipulation that in case of a failure to pay any instalment of interest, the principal should become due and collectable, with all arrearages of interest; and that on failure to pay the principal or interest when due, 5 per cent. damages should be collected on the whole amount, and costs.

The action was brought on the 26th day of *March*, 1851, against *David P.* and *Peter Shook*, the other party being dead. *David P. Shook* made default. *Peter Shook* pleaded six pleas, on the second and third of which issues were

joined, and to the first, fourth, fifth and sixth, demurrers were sustained. There was a trial of the issues joined upon the second and third pleas, which resulted in a verdict for the plaintiff for 687 dollars and 42 cents debt, and 169 dollars and 6 cents damages. Motion for a new trial overruled, and judgment on the verdict.

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The first subject which demands our attention is, the issues of law arising upon the demurrers to the first, fourth, fifth and sixth pleas. The first, being a plea of *nil debet*, was evidently bad; but the plaintiff in error seeks through it to attack the declaration.

One objection taken to the declaration is, that the suit is brought "for the use of *Ripley* county," and "on the relation of the county auditor," and the case of *The State, ex rel., &c. v. Votaw*, 8 Blackf. 2, is relied on in support of this objection. It was decided in that case, that the county treasurer was a proper relator, where the action was brought to recover a portion of the surplus revenue to which the county was entitled. We think that decision correct; but it does not follow that no other person could properly become a relator. It was as much the duty of the auditor, by law, to protect and preserve this fund as of the treasurer. R. S. 1843, pp. 251, 252, 253, ss. 97 to 103. We think the board of commissioners, the treasurer, auditor, or any other officer whom the law charged with the duty of protecting and preserving the fund, might properly be a relator, and that the declaration was unobjectionable for the reason alleged.

The statement that the suit was brought "for the use of the surplus revenue fund," is of no consequence; it might be rejected as surplusage.

Another objection taken to the declaration is, that the breach is insufficient, because it states the action to have accrued upon the non-payment of the annual instalments of interest. It is true the pleader has so laid his breaches; but as this action was not brought until the principal on the last of the several bonds was due, and as there is to each count a breach laid, in which the non-payment of the bond is averred, the defect, if any, is cured.

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It is further objected that the breaches are insufficient, in failing to allege the non-payment of the money to the county of *Ripley*. This objection is answered by the fact that the money did not belong to the county of *Ripley*. It belonged to the *United States*, but was held in trust by the state, who was the legal custodian of the fund. The averment that it had not been paid to the state was sufficient.

The declaration is good in substance, and no defects of form can be examined when it is attacked by means of a demurrer to a defective plea.

The fourth plea is *actio non*, as to 500 dollars of the principal, and all the interest in said bonds mentioned, and all costs, because the said writings obligatory "are usurious, as therein stated," and the said *David P. Shook* has paid interest thereon amounting to 500 dollars, before the commencement of this action. The fifth plea is *actio non* as to 206 dollars and 36 cents of the principal, and all interest and costs, because the said *David P. Shook*, before the commencement of this suit, paid the plaintiff the said sum of 206 dollars and 36 cents as interest at 7 per cent. per annum on said bonds, which was usurious. The question arising upon the demurrer to these pleas is, whether the bonds set out in the declaration are usurious upon their face. We think they are not. At the time they were made, interest might lawfully be taken upon loans of the surplus revenue, at the rate of 7 per cent. per annum in advance. R. S. 1843, p. 251, s. 95.—*Id.* 244, s. 36. And the statute fixing the rate of interest generally, and defining the offence of usury, expressly excepts from its operation those provisions of law which relate to the loaning of the trust funds of the state. *Id.* 583, s. 38. The bonds declared on are substantially in the form prescribed by the statute to be taken upon loans; and in the absence of any averment in the pleas that they were made upon any other consideration, the presumption is that they were given for money borrowed from that fund, and, consequently, it was not usury to reserve and take interest upon them at the rate of 7 per cent. per annum in advance.

There is some difference in the form of the fourth and fifth pleas. The latter states the usury to consist in the taking of 7 per cent. interest, which we have shown was not usurious. The fourth plea does not state the rate of interest taken, but avers that interest had been paid by one of the obligors, upon the several bonds, to the amount of 500 dollars. We shall not stop now to inquire whether an agent of the state, whose duties are prescribed by law, can, after a contract has been made, which was lawful in its inception, impair its obligation by taking an excess of interest. He has certainly no warrant from his principal, the state, for the illegal act, nor is there any presumption that the state ratifies the unauthorized act of her agent; and it would seem to follow that he who pays an excess of interest, under such circumstances, must suffer for his own folly. But we do not think it necessary, at present, to decide that question. There is no averment, in the fourth plea, that the excess was taken with a corrupt intent. In the case of *Reed v. Coale*, 4 Ind. R. 283, it was held that an instrument apparently usurious, could not be shown to have been made so without a corrupt intent. In the case of *Sutton v. Fletcher*, 6 Blackf. 362, it was held that a contract was not usurious, if the excess was contracted for by mistake, and without a corrupt intention; and evidence of the mistake was allowed. The conflict between these two cases is apparent rather than real. In *Reed v. Coale*, the usury appeared on the face of the instrument; in the other case it did not. In the first case, to have admitted evidence that the note was made to draw 10 per cent. through ignorance of a recent change of the law in relation to interest, would have been a departure from one of the soundest and most imperative rules of the law. But in the other case, a note not usurious on its face, was made for too large a sum, by an erroneous computation made by a third person who was called upon to draw it. This fact was proved, and correctly, in answer to a defence of usury set up to an action on the note. In the case of *Cohee v. Cooper*, 8 Blackf. 115, it was held that a plea of usury must aver that the agreement to take it was corruptly

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made. In that case the excess did not appear upon the face of the contract, and, in such a case, at least, however it may be in regard to those where it does appear, the averment of a corrupt purpose is indispensable.

The sixth plea, which is pleaded to the first, second and third counts only, states that *Peter* and *Hezekiah Shook* were sureties for *David P. Shook* in said bonds; that after they became due, to-wit, on the 23d day of *January*, 1848, the plaintiff, without the defendant's knowledge, and against his will, agreed with *David P. Shook*, the principal, that in consideration that he would pay interest thereon at the rate of 7 per cent. per annum from that day to the 23d day of *January*, 1849, the plaintiff would give day of payment until the latter date; that (the previous interest having been paid) the said *David P. Shook* thereupon paid 21 dollars, being 7 per cent. interest in advance, and that thereupon the plaintiff gave day for one year, and until the bringing of this suit, during which time the said *David P. Shook* became insolvent.

Supposing it competent to allege that the state entered into an agreement of the kind set out in the plea, without the intervention of some agent authorized to make such a contract, which is not pretended, still the plea is defective because it shows no consideration for the supposed agreement for giving day. As we have already shown, the bonds in question drew interest at the rate of 7 per cent. per annum, payable in advance, and, as we understand them, the interest was to be paid annually. It was evidently the intention of the parties that time might be given on these bonds after maturity. The first was due one year after date, the interest payable in advance, and still it contains this stipulation, "that in case of failure to pay any instalment of interest, the said principal shall become due and collectable, together with all arrears of interest; and on failure to pay the principal or interest when due, five per cent. damages on the whole sum shall be collected, and costs." Now, as this bond was due one year after date, and, as the interest for that year had been already paid, there could be no sense in a stipulation for

the payment of future instalments of interest in advance, unless further time was to be given. The term "payable in advance," of itself, necessarily implied that at least one year's delay should be given after the payment of an instalment of interest. And we think this intantion is evident from the language of all the several bonds, as well as of that which should first become due. As there was no consideration for the alleged agreement, it was not obligatory upon any party to it, and consequently it was not available for any purpose. The demurrer to this plea was properly sustained.

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The second plea was, that the bonds sued on were executed without any consideration. The third was a plea of payment. Upon the trial of the issues joined upon these pleas, it appeared in evidence that previous to the date of the said bonds there was a deficiency in the surplus revenue funds of *Ripley* county, and that the board of commissioners appointed an agent to adjust the matter with *David P. Shook*, who had been an agent for the loaning of the fund. That *Shook* denied that the funds were in his hands, but alleged that they were in the hands of one *Watts*, who had preceded him in the agency. The agent appointed by the board of commissioners, in settlement of the defalcation, took from *David P. Shook* the bonds in question, with the other obligors as his sureties, for the amount of the deficiency, and reported his doings to the board of commissioners, who, by an order entered of record, approved the settlement. It further appeared that the interest had been paid annually, at 7 per cent., on the first and last of said bonds, to *January 23, 1849*, and on the second and third to *January 23, 1850*, which payments were properly indorsed by the auditor.

The Circuit Court instructed the jury, at the instance of the plaintiff, among other things, that if they believed from the evidence that the bonds were given in satisfaction of a claim which the state had against *David P. Shook*, for a balance alleged to have been in his hands, at the time the bonds were made, the plea that the bonds were made without consideration is not sustained.

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The plaintiff in error complains of this instruction, by which he understands the jury were told that if the plaintiff pretended to have a claim against *David P. Shook*, and if the bonds were given for the adjustment of it, however false or groundless it may have been, the plaintiff was entitled to their verdict. We think the import of the charge is misconceived. The instruction was not upon an abstract question of law, but had reference to the proof. Taken in connection with the evidence, nothing can be clearer than that the bonds were in fact given for a consideration. It is an unreasonable presumption, and one not to be indulged in, that a person charged with a defalcation to the amount of near 700 dollars, would acknowledge it by giving bonds and security for its payment, if he were not in fact liable. The proof in the case scarcely tends to show that he had not retained the money in his hands, and is very far from that clear evidence which would have authorized a verdict for the defendant on that issue. Taken in connection with the evidence, the instruction was clearly right.

Under the plea of payment there was no evidence offered, except the indorsements of the payment of interest as they appeared on the bonds. These were excluded from the amount of the verdict, which, so far as that plea is concerned, is for the proper amount.

The amount of the verdict is also complained of. It appears by computation that it includes interest at 7 per cent., and the 5 per cent. damages stipulated for in the bonds. There is no issue upon the record to which any evidence offered would have been applicable, for the purpose of reducing the amount of the verdict; but, supposing the defendant entitled to show, in an action of debt upon specialty, in which interest is sought to be recovered in the form of damages for detention, any matter proper to reduce the amount, we think it is not shown in this case. It appears from the evidence that the bonds were given to settle a defalcation, and they were made in the form required upon loans, to become due at future periods of time, with interest payable annually, and we are to pre-

sume that the parties intended to give them the character of a loan. It was of little consequence whether the money was paid, and received back in the form of a loan, or retained by *Shook*. Had the former been done, the bonds would have been in substantially the same form. It was treated by the parties as a loan, by the payment of interest from time to time, and we think the jury had a right so to regard it.

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Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

E. Dumont, for the plaintiffs.

J. Ryman, for the state.

HALE and Others v. PLUMMER and Others.

By the chancery practice, if affirmative matter in an answer which is made a cross bill, is not denied either by a replication or an answer to it as a cross bill, it is taken as true.

A release of dower by the wife in the conveyance of the husband's real estate, is a valuable consideration, and the sum to be paid for it may be secured to the wife through a trustee, if the parties so agree.

The wife of a partner has an inchoate right of dower in real estate of the partnership, upon which the character of personalty has not been purposely impressed by the partners, and which is not needed to discharge the debts of the partnership or to adjust the claims of the partners as between themselves.

ERROR to the *Floyd* Circuit Court.

Monday,
May 28.

GOOKINS, J.—This was a bill to foreclose a mortgage, brought by *Plummer*, and *Benton* and wife, against *Hale*. The property mortgaged was part of a lot in the city of *New-Albany*. The mortgage was made to *Plummer*, as trustee of *Mrs. Benton*, to secure the payment of ten promissory notes of 100 dollars each. The first and second notes having been paid, and the third and fourth being

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Hale's answer admits the execution of the notes and mortgage, and that eight of the notes remain unpaid. He makes his answer a cross bill, and sets up the following facts: That previous to the execution of the mortgage, he and the plaintiff, *Benton*, had been partners in the milling business; that their partnership property consisted of certain lots in *New-Albany*, and a steam-mill erected thereon, and three lots in a tract known as *Griffin's* tract, in *Floyd* county; that the firm of *Hale* and *Benton* was dissolved at the date of said notes and mortgage, being in debt to the amount of about 12,000 dollars; that *Benton* conveyed all his interest in the partnership property to *Hale*, who was to pay the partnership debts; that supposing said *Hannah Benton* to have an inchoate right of dower in said mill property, he gave her said notes and mortgage to induce her to join with her husband in said conveyance, her signature and seal to said conveyance being the only consideration of the notes and mortgage; and that he procured from the creditors of the firm a discharge of *Benton* from all the partnership debts, and assumed their payment himself.

The cause was set down for hearing upon the bill and answer. The Circuit Court held the answer insufficient, and a final decree of foreclosure was entered, from which the representatives of *Hale*, who is dead, prosecute this writ of error.

The affirmative matter in the answer not having been denied, either by a replication, or an answer to it as a cross bill, must be taken as true; and we are to consider whether the facts stated therein show that the notes and mortgage were without consideration.

It has been several times decided by this Court, that the sale of an inchoate right of dower, or even of a right vested by the death of the husband, can not be made until after the dower has been set apart. But we do not view this transaction as coming within that rule. The sale of the interest of *Benton* in the partnership property,

and the making of the notes and mortgage, were concurrent acts, and must be viewed as parts of one transaction. The sum of 1,000 dollars, secured to Mrs. *Benton* through her trustee, by means of this mortgage, must be regarded as a part of the consideration for the sale of the mill property. No one will doubt, we presume, that a release of dower by the wife, in a conveyance of the husband's real estate, is a valuable consideration, and that the sum to be paid for it may as well be secured to the wife, through a trustee, as in any other way, if the parties so agree.

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But it may be answered, the widow of a deceased partner is not entitled to dower in real estate, held for partnership purposes. It is true that real estate may be so held for partnership purposes as to exclude the widow's right of dower; but we think it may also be so held as not to exclude it. Mr. *Story* says, that "so far as the partners and their creditors are concerned, real estate belonging to the partnership is, in equity, treated as mere personalty, and governed by the general doctrines of the latter." And so it will be deemed, in equity, to all other intents and purposes, if the partners themselves have, by their agreement or otherwise, purposely impressed upon it the character of personalty." *Story on Partnership*, s. 93. In the absence of any such agreement or act, the same writer says, there is a great diversity of judicial opinion, and of judicial decision, as to whether it is to be treated as real or personal property. Upon looking into the authorities, *English* and *American*, it is quite evident that the effort to reconcile them would be a hopeless task, and we are left to adopt what seems to us the more reasonable rule upon the subject. In a late decision in *New-York*, chancellor *Walworth* uses the following language: "The *American* decisions in relation to real estate purchased with partnership funds, or for the use of the firm, are various and conflicting. But I think they may generally be considered as establishing these two principles. *First*, that such real estate is in equity chargeable with the debts of the co-partnership, and with any balance that may be due from one co-partner to another, upon the winding up of the affairs of the firm.

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Secondly, that as between the personal representatives and the heirs at law of the deceased partner, his share of the surplus of the real estate of the co-partnership, which remains after paying the debts of the co-partnership, and adjusting all the equitable claims of the different members of the firm, as between themselves, is to be considered and treated as real estate." *Buchan v. Sumner*, 2 Barb. Ch. R. 165. See, also, *Buckley v. Buckley*, 11 Barb. S. C. R. 44.

The High Court of Chancery in *Maryland* has adopted the rule, as indicated by judge *Story*, in the section quoted from his work on Partnership. That Court decided, in the case of *Goodburn v. Stevens*, that the real estate of a partnership, though regarded in a Court of Equity as personal estate for all partnership purposes, yet in the absence of an express or implied agreement, indicating an intention to convert it into personal estate, it will, when the claims of the partnership have been satisfied and the partnership accounts adjusted, be treated in a Court of Equity as at law, as real estate, and be subject to the dower of a deceased partner. 1 Md. Ch. Decisions 420.

Collyer on Partnership, 69, states the proposition generally, thus: If, under all the circumstances, it appear that the heir is to have a *beneficial* interest, the widow of the deceased partner will be entitled to dower. For this doctrine, the writer quotes the case of *Bell v. Phyn*, 7 Ves. 453. The editor of *Collyer* states that the deed in that case was to the partners, their heirs, &c., as *tenants in common*, which is not shown by the reported case. If that fact should be taken as a modification of the doctrine, as stated in *Goodburn v. Stevens*, still it would not affect the present case. We are not informed by the answer what were the terms of the partnership between *Hale* and *Benton*. Nor is there anything in the case to show that the partners have impressed upon the real estate held by the partnership the character of personal property, with its incidents only, nor that it was necessary to pay partnership debts. *Hale* has undertaken to show that the notes and mortgage were given without consideration; but he has failed to do so. Indeed, it appears by the answer, that

the partnership debts are all settled, and that *Benton* was discharged from them, at the time this transaction occurred, which is shown by a recital in the deed from *Benton* and wife to *Hale*, annexed to the answer as an exhibit. It appears affirmatively, therefore, that the property was not required for any of the exigencies of the partnership. It may have been worth much more than the 12,000 dollars which the firm owed. The answer does not state its value, and the parties by their contract estimated it at 1,000 dollars, at least, beyond the partnership liabilities.

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We conclude, therefore, that as this case is presented by the answer, Mrs. *Benton* had a contingent right of dower in the property, and the parties having by their contract put their estimate upon its value, there is not shown by the answer any equitable defence to the complainants' bill.

Per Curiam.—The decree is affirmed, with 1 per cent. damages and costs.

H. P. Thornton, J. Collins and J. C. Moody, for the plaintiff.

R. Crawford, for the defendant.

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Where the execution of a written instrument, referred to in the pleadings, is called in question, it must, by the R. S. 1852, be denied either by affidavit before trial, or by a pleading under oath.

Sections 75 and 785 of the practice act do not apply to pleadings in denial of the execution of written instruments.

The charter of a railroad company required that notice of the demand for the payment of instalments on subscriptions, should be published in a newspaper, &c., at least three weeks prior to the day the instalments became due. In a suit to recover instalments, a copy of the publication made in the newspaper, accompanied by the publisher's oath that it had been so published for three weeks, was produced in evidence. On objection that the

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three successive papers in which the notice was published were not produced, *held*, that the evidence was *prima facie* sufficient.

In a suit by a railroad company, a stockholder is a competent witness for the company.

APPEAL from the *Henry* Circuit Court.

STUART, J.—The turnpike company sued the appellant on his subscription of six shares of stock of 25 dollars each. The complaint alleges the subscription to have been made payable as the directors of the company might require; and it is averred that the directors had made such order, of which the appellant had due notice, &c.

The defendant answered, controverting in detail the several matters alleged in the complaint, only two of which negative averments raise any question for our consideration.

1. He denied, with some circumlocution, that he had subscribed any stock.

2. He denied that the directors had made the alleged order for the payment by instalments, and negatived notice, demand, &c.

Trial by the Court, and judgment for the plaintiff for the amount of the subscription.

The evidence is properly embraced in the record.

The plaintiff introduced the subscription book, with the appellant's name, and subscription for six shares. The defendant offered to prove, at the proper time, that the name was not in his hand-writing, and that it was put there without his authority. But on objection made, the Court excluded the evidence. We are of opinion that the ruling was correct. The trial was had under the new practice. The act of 1852 is differently expressed from that of 1843. R. S. 1843, p. 711. When the execution of a written instrument referred to in the pleadings, is called in question, it must be denied either by affidavit before trial, or by a pleading under oath. 2 R. S., p. 44, s. 80. Without the adoption of one or the other of these modes, the defendant should not be allowed to question the execution of the instrument. For by the 80th section, *supra*, he is entitled in all cases to have inspection before pleading.

The object of this is to enable him to determine whether the writing be genuine. If it is a forgery, and he fails to deny its execution in the one or the other of the statutory modes, he not only waives proof of such execution on the part of the plaintiff, but precludes himself from addressing any evidence to that point. And the reason is obvious. For otherwise the parties would not meet on equal terms. The plaintiff would be taken by surprise. Nothing in the record would indicate that the execution of the instrument was to be contested; and the attack on a vital part of his case would have to be met without notice or preparation.

We are therefore of opinion that until the statutory basis was laid, evidence going to the execution of the subscription-paper was inadmissible.

It is urged that other parts of the revision provide that pleadings put in under oath shall not have any more weight or impose any higher proof upon the opposite party. 2 R. S., p. 44, s. 75, and p. 205, s. 785. But those sections have no application to written instruments, if they were in force. And section 75 has been so amended as to except section 80, in terms, from its provisions. Section 785 is in the very words of section 75. The amending act may be found in the laws of 1853, p. 101. But we consider section 80 sufficiently explicit to bear the construction we have placed upon it, whether the other sections were amended, repealed, or in full force; the language and context of those sections point so clearly to a different subject-matter.

2. The second point is on the denial of the order or call made by the directors for the payment of instalments. The charter of the company requires that notice of the demand for the payment of instalments shall be published in a newspaper of the county, at least three weeks prior to the day the instalments are made due. Local Laws of 1849, p. 403. A copy of such order and publication was produced in evidence, and admitted over the objection of the appellant. The point of objection was that one copy, with the oath of the publisher to its having been so published three weeks, was not sufficient, but that the three

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successive papers in which it appeared should be produced. The evidence, it would seem, was *prima facie* sufficient to shift the burden of the proof upon the defendant that it had not been so published.

One *Davis*, a stockholder, and director of the company, was introduced as a witness. He was objected to on the ground of interest, but the objection was overruled. That is also presented by bill of exceptions. The witness was clearly competent. This we have already decided in several cases not yet reported.

On the subject of incompetence by reason of interest, it is proper to correct a mistake in *McCall v. Seevers*, 5 Ind. 187. The opinion was originally prepared as reported; but in consultation, it was agreed that the question should be decided on the releases, and that the interest, at best, was too remote—striking out what related to the statute. By some inadvertence it was not stricken out at the time, and was overlooked afterwards, without any fault of the Reporter.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

W. Grose, for the appellant.

J. T. Elliott and *J. H. Mellett*, for the appellees.

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DICKERSON and Another v. THE BOARD OF COMMISSIONERS OF RIPLEY COUNTY and Another.

The party applying for an injunction upon the collection of a judgment, was only obliged, by the R. S. 1843, to indorse on his bill a release of errors in the judgment, when required so to do by the Court.

An equitable estoppel is thus described: Where the payee, upon an agreement supported by a sufficient consideration, extends the time of payment to the principal, without the consent of the surety, the latter is discharged, the payee being equitably estopped.

The payment of interest in advance is a sufficient consideration to support an agreement for further forbearance.

Where the relation of principal and surety exists between the makers of a written instrument, though the instrument be wholly silent as to which is surety, and even be joint and several, the makers, as against the payee or obligee, for the purpose of letting in any act of the latter tending to affect the collateral relations of the makers, may show the true relation of the makers to each other.

An agreement with the principal, in order to release the surety in a written instrument, need not operate to release the debt.

A surety will be discharged by any agreement of the creditor with the principal, which, if violated, would give the surety a right of action.

It is not necessary, to discharge the surety, that the agreement should be such as he could plead in bar of a suit; it is sufficient if it fetter and embarrass the discretion of the creditor.

An instrument under seal can not be discharged by a mere parole agreement; but where the agreement is executed, the act, coupled with the agreement, is sufficient to discharge the obligation.

An equitable estoppel may be set up as well at law as in equity.

That a party has mistaken or been misadvised as to his rights, and so failed to set up a defence at law, does not entitle him to relief in chancery.

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APPEAL from the *Ripley Circuit Court*.

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STUART, J.—Bill in chancery by sureties to enforce an alleged equitable estoppel.

The bill alleges that *Dickerson* and *John L. Shook* were sureties, and *David P. Shook* principal, in a surplus revenue bond for the loan of 203 dollars, executed on the 11th of *February*, 1847, with interest payable in advance. The bond is stated to have been joint and several, but that the relation of principal and surety subsisting between the obligors was well known to the county officers with whom the loan was negotiated. It was due *February* 11, 1848. On the third of *March*, 1848, the ninth of *March*, 1849, and the fifth of *February*, 1851, respectively, a year's interest was paid by *David P. Shook*, which settled the interest payable in advance, up to *February* 11, 1850.

The complainants aver that in consideration of these payments, the officers having control of the surplus revenue fund extended the time of payment of the principal sum to the said *David*, without the consent or knowledge of his sureties.

It is further alleged, that in *September*, 1851, a judgment at law was recovered on the bond against all the parties, by default. And the reason set up for not defending at

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law is, "because your orators were informed and believed that their defence was of an equitable and not of a legal nature, and hence could not avail themselves of their said defence at law." The prayer of the bill is for answer, &c., that the collection of the judgment be enjoined, and for general relief.

Demurrer to the bill sustained, and, on complainants failing to amend, dismissed.

It is objected that there is no release of errors. The objection is not well taken. *Addleman v. Mormon*, 7 Blackf. 31, is referred to in support of the objection. But that decision is on a statute different from the one governing this case. These proceedings were had while the statute of 1843 was in force. The provision on that subject is, that "such complainant shall indorse and sign on his bill a release of errors in said judgment, whenever required so to do by the judge granting such injunction, or by the Court." R. S. 1843, p. 852, s. 130. To make the objection available, it should appear that such an order had been made, and that the complainant had failed to comply. It is only when required to do so, that he is to indorse a release of errors on his bill.

The main question in the case, viz., the doctrine of equitable estoppel, though urged by complainants, is not discussed by the defendants' counsel. It is not proposed to go into it further than the case made in the bill requires.

Equitable estoppel is generally thus defined: When the payee, upon an agreement supported by a sufficient consideration, extends time of payment to the principal, without the consent of the surety, the latter is discharged, the payee being equitably estopped.

The instrument by which these parties were bound, reads in these words: "We, or either of us, promise to pay to the state of *Indiana*, for the use of the surplus revenue deposited with the state of *Indiana*, on or before the 11th day of *February*, 1848, the sum of 203 dollars and 27 cents, with interest thereon at the rate of seven per cent. per annum in advance, commencing on the 11th

day of *February*, 1847, and do agree that in case of failure to pay the principal or interest when due, five per cent. damages on the whole sum due shall be collected, with costs, by action of debt, in any Court of competent jurisdiction. Witness our hands and seals, *February* 11, 1847. *David P. Shook*, [SEAL.] *Telford Dickerson*, [SEAL.] *John L. Shook*, [SEAL.]”

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Here, it will be perceived, is a direct liability under seal. The sureties do not undertake collaterally. The agreement to pay is joint and several, and made directly to the state, for the use, &c. These features, it will be seen, divest the case of part of the subtleties surrounding the question.

That the payment of interest in advance is a sufficient consideration to support an agreement for further forbearance, is too well settled to admit of discussion. *Bailey v. Adams*, 10 New Hamp. 162.—*Fowler v. Brooks*, 13 *id.* 240.—*McComb v. Kittridge*, 14 Ohio 348.—*Harbert v. Dumont*, 3 Ind. 346. Here, it is alleged, that upon a contract for forbearance, in consideration of the payment of interest, the time was extended from year to year without the consent of the sureties.

Without stopping to inquire what subtle distinctions the authorities draw against the complainants, even on this state of facts, and without reference to the surplus revenue acts, we proceed at once to the main question. Was this defence available in equity only, or was it also available at law?

Admitting it to have been available in equity only, it might be suggested whether the bill should not have been filed while the legal proceedings were pending. However that may be is not so material; for if the matter set up was a defence at law, then the Court below was correct in dismissing the bill.

The leading case on the side that it was not a defence at law, is *Davey v. Prendergrass*, 5 Barn. and Ald. 187. The decisions in 8 Price 467, 4 Wash. 620, 1 Mees. and Welsb. 564, *Tate v. Wymond*, 7 Blackf. 240, *Carr v. Howard*, 8 *id.* 190, go upon the authority of *Davey v. Prender-*

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That was an action of debt on a surety bond conditioned for the payment, in one month, of whatever balance might be found due on settlement, not exceeding £500. The second plea set up that the plaintiffs had, by parol agreement, without the privity of the defendants, given time to the principal to pay, by instalments of £100 a month, the balance of £1,099 found due on settlement, and a warrant of attorney was given accordingly. *Abbott*, C. J., puts the decision on purely technical grounds. Thus: "The ground of my opinion in this case, is that general rule of the common law which requires that the obligation created by an instrument under seal shall be discharged by force of an instrument of equal validity." In the separate opinion of *Holroyd*, justice, it is said—"The mere giving time by parol, without consideration, is not even binding on the party himself. That [the warrant of attorney] was certainly a good consideration for the forbearance. But a mere engagement not to sue for a limited time, is not a release in law of the original debt."

This decision was in 1821. In 1836, the case of *Ashbee v. Pidduck*, often relied upon, to the same effect, was made in the Court of Exchequer. There three persons had signed a bond, and as in the case at bar, it did not appear anywhere on the face of the bond that two of them were sureties for the other. And it was held that a release by the obligee to the representative of one of the deceased obligors, was no answer to an action against the surviving obligors. 1 Mees. and Welsb. 364.

The *American* editor appends a note, successfully questioning this decision, on the authority both of *American* and *English* cases. Among others he cites *The Bank v. Woodward*, 5 N. H. 99; *Gifford v. Allen*, 3 Met. 255; and *Bell v. Banks* (by *Tindal*, C. J.,) 3 Scott N. R. 503. And the report shows that the ruling is not one on which the Court had taken time to advise, but is given in a conversational way by *Abinger*, C. B., in the course of the argument at bar.

From the opinions of the judges *seriatim*, in *Davey v. Prendergrass*, the following points may be deduced as held applicable to that case:

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1. That it not appearing on the face of the bond that the defendants were sureties, it could not, as against the obligee, be pleaded and shown that they were so. Accordingly, *Ashbee v. Pidduck*, *supra*.

2. That a mere engagement not to sue for a limited time, even supported by a good consideration, is not a release in law of the original debt, and therefore can not operate to release the surety.

3. That an instrument under seal can not be released or discharged by a parol agreement.

On the first point, the decisions are numerous and conclusive against the ruling of the *English Courts*. *Harris v. Brooks*, 21 Pick. 195.—*Carpenter v. King*, 9 Met. 511.—*The Bank v. Hoge*, 6 Ham. 17.—*Bank v. Kent*, 4 N. H. 221.—*Artcher v. Douglass*, 5 Denio 307.—*Bell v. Banks*, 3 Scott, N. R., 503. And to the same effect, though with obvious misgivings on the part of the Court, *Harbert v. Dumont*, 3 Ind. 346. *Carpenter v. King* was debt on a judgment rendered on a joint obligation, without anything on its face to show that one was merely surety for the other. After judgment against both, a parol assurance was given to the surety that it was paid. It was held that, even in the absence of fraud, the defendant, going behind the judgment, might show the collateral relations subsisting between the payors, within the knowledge of the plaintiff, and thus form a basis for the defence growing out of the subsequent acts of the plaintiff. The other authorities are directly in point to the same effect. In *Bell v. Banks*, the reasoning of *Tindal*, C. J., is that the giving forbearance to the principal, without the knowledge of the surety, is a legal fraud upon the latter; and the defence growing out of this fact, coupled with the subsidiary relations of the parties, is not in contravention of the terms of the contract. In *Harbert v. Dumont*, *supra*, *Harbert* sued *Cheek*, *Dumont* and *Glenn*, on a joint and several note. *Dumont* and *Glenn* pleaded that in consideration of

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the receipt of usurious interest, time had been given without consent, &c., and the defence was sustained, on the authority of an *English* case, *Owen v. Homan*, 3 Eng. L. and E. R. 112. It may therefore be regarded as settled, that even as against the payee or obligee, for the purpose of letting in any act of the plaintiff tending to affect the collateral relations of the defendants, and even when the instrument is joint and several, and wholly silent as to which is surety, the true situation of the parties as principal and surety may be shown.

2. The second proposition is equally untenable, viz., "that a mere engagement not to sue for a limited time, even supported by a good consideration, is not a release in law of the original debt, and therefore can not operate to release the surety." The error is in assuming that to release the surety, the contract must be such as to release the debt as to all the parties. This is not necessary, and is not claimed. It is not pretended that the forbearance given discharges the principal. But such indulgence, without consent, &c., is set up as an act of the plaintiff, collateral to the main contract, which entitles the surety to be exonerated.

That the forbearance is only for a limited time can not affect the case. The suspension of the right to sue for a month, or even a day, is as effectual to release the surety as a year or two years. *Fellows v. Prentiss*, 3 Denio 512. The existence of such a contract for delay as, if violated, would give the principal debtor a right of action, will be sufficient to discharge the surety. Such contract need not deprive the creditor of the power of suing. It need not be such as the debtor could plead in bar of the suit. If it fetter and embarrass the discretion of the creditor, it changes the situation of the surety. *Owen v. Homan*, as quoted in 3 Ind. 349.—*Turrill v. Boynton*, 23 Vt. 142.—*Smith v. Day*, *id.* 656.

3. The third position assumed in *Davey v. Prendergrass*, and seemingly sanctioned in 7 Blackf. 260, and 8 Blackf. 190, presents, at first impression, more difficulty. That an instrument under seal can not be released or discharged by

a mere parol agreement, is undoubtedly the law. It is not claimed that so long as the common-law doctrine in relation to seals prevails, a mere parol agreement is sufficient to discharge a writing obligatory. But it is claimed that acts may be done under a parol agreement, and in pursuance of it, which may have that effect. So that when an executed parol agreement is set up, it is not the agreement alone, but the thing done under it, that is relied upon. A parol agreement to receive depreciated bank paper in discharge of a money bond, and an actual receipt of it accordingly, would be a good discharge of the specialty. Here it is not the parol agreement alone, but that and the act done under it, which is effectual.

It is upon this justly recognized distinction that the Courts which have ventured to question the *English* decisions have proceeded. In *Carpenter v. King*, the Supreme Court of *Massachusetts* apply it to a judgment. In *The Bank v. Leavitt*, the Supreme Court of *Ohio* apply it to a specialty. The facts in that case were these: A bond had been executed by two persons, the relations of whom, as principal and surety, were known to the plaintiff, though the fact of such relation did not appear on the face of the instrument. The bank accepted a confessed judgment from the principal, with an agreement for the stay of execution. By the terms of this agreement, forbearance was extended eighteen months. The plea setting up these facts came before the Court on demurrer. The Court say—"A surety can not be further bound than by the terms of his undertaking. These terms can not be changed without his consent. If any change is made, to the prejudice of his rights, without such consent, he may hold his obligation at an end. Any act which suspends his right to an instant pursuit of such remedy as belongs to sureties, absolves him from his liability. The defence which such an act gives to the surety is one proper to be set up in a Court of law. The doctrine is originally of chancery." And 2 Rand. 333, and numerous other authorities, are cited.

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The Bank v. Hoge was an action on a joint and several bond against three obligors. Plea, that they had executed the specialty as sureties, with notice of that fact to the plaintiff, and that the bank had subsequently bound itself to extend the time to the principal. Replication, that the defendants were estopped by their seal, &c. But the Court say—"There is no attempt here to deny the obligation of this paper or to evade its admissions. The defence sets up a distinct and independent fact beyond the terms of the writing, not controverting any of its stipulations." 6 Ham. 17.

In *Artcher v. Douglass*, the obligors of a bond given to indemnify the sheriff, were permitted to show that they were sureties, and so enable them to set up in defence that the principal had been released. 5 Denio 307.

We therefore conclude, on the weight of the *American* authorities, that the doctrine of equitable estoppel is a defence available at law as well as in equity.

Whether the facts here set up for relief in chancery would have constituted a good and complete defence at law, we do not decide. It is not before us. Nor do we give any intimation what effect we think our statutes in relation to sureties generally might have on such questions in a Court of law. Nor particularly do we decide what may be the effect of the provisions of the statute in relation to the surplus revenue, on the case at bar.

All we do decide is, that the matter set up, if a defence at all, was available at law. That the defendants were presumed to know. That they were otherwise advised and believed, does not avail. *Platt v. Scott*, 6 Blackf. 389. They have had their day in Court. That a party has mistaken his rights, and so failed to make his defence at law, does not entitle him to relief in chancery. *Raines v. Scott*, 13 Ohio 7.—*Raburn v. Shortridge*, 2 Blackf. 480.—*Park v. Morton*, 5 *id.* 1, and the authorities there cited.

Per Curiam.—The decree is affirmed with costs.

E. Dumont, for the appellants.

J. Ryman, for the appellees.

THE FRANKLIN INSURANCE COMPANY v. CULVER.

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The condition of an insurance policy issued to the plaintiff, provided that persons sustaining loss by fire, should forthwith give notice thereof, in writing, to the company or their agent, and as soon after as possible, deliver as particular an account of their loss as the nature of the case would admit of, (and if within their power, render to the company a schedule of the articles destroyed or damaged, stating article by article,) signed with their proper hands, and that they should accompany the same with their oath or affirmation, declaring the account to be just, &c., and what was the cash value of the subject insured. Whenever demanded in writing, they were also required to produce an exhibit of their books of account, and vouchers in support of their claim, and permit extracts and copies thereof to be made, &c. The conditions further provided that any fraud or false swearing by the insured, should cause a forfeiture of all claims, and be a bar to all remedies under the policy. In a suit upon the policy for a loss of the subject insured, the plaintiff exhibited the statement furnished by him to the company under oath, as follows: "One-story frame-house, 200 dollars; dry goods, 1,000 dollars; groceries, 150 dollars; queensware, 25 dollars; hardware, 25 dollars; the whole, 1,400 dollars." The statement further showed that all the bills of goods purchased by him, were consumed by the fire, and that he was therefore unable to make out an invoice of the items and cost of the articles destroyed, but that to the best of his knowledge and belief, said statement was true and just, and the fair cash value of the goods was between 1,400 and 1,500 dollars. It also appeared in evidence that the plaintiff's invoices were consumed with his goods, and that he had no copies, and that the company's secretary had called on him to sign an instrument requesting the persons from whom he had purchased the goods, to furnish the amounts of the invoices, but that he had refused to do so. The plaintiff obtained a verdict and judgment for 200 dollars less than the amount of his loss as alleged in his statement to the company.

Held, that the plaintiff was not required by the conditions of the policy to sign the instrument presented by the company's secretary.

Held, also, that the excess of the plaintiff's claim, as furnished to the company, over the verdict, did not show him to have been guilty of "false swearing."

Held, also, that by "false swearing" was meant, the swearing to a false statement knowingly.

An instruction will be presumed to have been pertinent to the evidence, where the contrary does not appear.

APPEAL from the *Johnson* Circuit Court.

Monday,
May 28.

DAVISON, J.—Assumpsit by *Culver* against the *Franklin Insurance Company*, upon a policy against fire, for 1,400 dollars, on a store-house and stock of goods, viz., 200 dollars on the house and 1,200 dollars on the goods. The policy was issued *March* 10, 1852, for one year from that

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date, and on the 3d of *April* following, the store-house, with all the goods, was consumed by fire. Plea, the general issue. Verdict in favor of the plaintiff for 1,200 dollars. New trial refused, and judgment.

The policy, among other conditions, contained the following: "Persons sustaining loss by fire, shall forthwith give notice thereof in writing to the company or their agent, and, as soon after as possible, deliver as particular an account of their loss as the nature of the case will admit, (and if within their power, render to the company a schedule of articles destroyed or damaged, stating article by article,) signed with their proper hands; and they shall accompany the same with their oath or affirmation declaring the said account to be just," &c.; "also what was the cash value of the subject insured," &c. "And whenever required in writing, the insured shall produce an exhibit of their books of account and vouchers to the insurers, in support of their claim, and permit extracts and copies thereof to be made," &c. "Any fraud or false swearing by the insured shall cause a forfeiture of all claims, and shall be a full bar to all remedies under the policy."

The property destroyed, and its value, was stated by *Culver*, under oath, to be as follows: "One-story frame store-house, 200 dollars. Dry goods, 1,000 dollars. Groceries, 150 dollars. Queensware, 25 dollars. Hardware, 25 dollars. The whole, 1,400 dollars."

His statement further shows that all the bills of goods purchased by him were consumed by the fire, and he was, therefore, unable to make out an invoice of the items and cost of each article destroyed; but that to the best of his knowledge and belief, the above was true and just; and that the fair cash value of said house and goods was between 1,400 and 1,500 dollars, according to the best of his judgment.

All the evidence is not set out in the record; but it was shown that the plaintiff's invoices were consumed with his goods, and that he had no copies; that the defendants' secretary had called on him to sign an instrument in writing, requesting the persons from whom he had pur-

chased the goods to furnish the amounts of the invoices, but that he declined doing so. May Term, 1855.

In relation to this evidence, the Court charged, that "if the plaintiff furnished the names of the merchants from whom he had purchased, he did all that was his duty *prima facie*. Had the defendant applied to the names furnished, for copies of the invoices, and they had declined furnishing them, without the plaintiff's consent, his refusal to give it, would afford a strong presumption in favor of a low assessment." THE FRANKLIN INSURANCE CO. v. CULVER.

This instruction is said to be objectionable. We are not of that opinion. There is nothing in the conditions annexed to the policy which required the plaintiff to sign the instrument proposed by the defendants' secretary. The charge must be presumed to have been pertinent to the evidence, and it may, therefore, be inferred that there was evidence tending to show that the plaintiff furnished the names of the merchants from whom he purchased; also that there was no proof that they declined for want of his consent. This being the case, we think the jury were correctly instructed.

The amount claimed, by the preliminary affidavit, appears to exceed the verdict 200 dollars, which excess, it is contended, shows the plaintiff to have been guilty of *false swearing* and entitles the defendant to a new trial. The jury were distinctly told, that "if it appeared, from the evidence, that the plaintiff, in his sworn statement, *knowingly* exaggerated his loss, they were bound to find for the defendant." It can not be assumed that this instruction was disregarded. And if it was a correct exposition of the law, the new trial was properly refused; because the point involved in the charge of the Court raised a question of fact peculiarly for the consideration of the jury.

The appellant contends that the error of the instruction consists in the use of the term "*knowingly*;" "that false swearing *knowingly* is perjury, which, in law, is not synonymous with *false swearing*." We are not prepared to admit that interpretation, as applicable to the contract before us; because it induces the conclusion that a mere

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1855.
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LIN INSUR-
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mistake, in the plaintiff's estimate of the property consumed, would "cause a forfeiture of all his claims under the policy," which, in our opinion, would be an absurdity. No false swearing by the assured in relation to the extent of his loss, should be allowed to defeat a recovery, unless it be intentionally false. *Moore v. The Protection Insurance Company*, 16 Shep. 97.—Angell on Fire and Life Insurance, s. 260, and note.

In the present case, no basis existed by which the amount destroyed could be ascertained with any degree of accuracy. The invoices having been consumed with the goods, and there being no other account of the stock on hand, the statement of the insured could be nothing more than the result of his own deliberate judgment, without the means of testing its correctness by numerical calculation. Whether, in the language of the instruction, he "knowingly exaggerated his loss," was for the jury to determine. The value of the property, as estimated by the insured, it must be presumed, was properly considered with all the other evidence upon the same point. And though the jury, in view of all the facts, may have been convinced that he had erred in opinion, still they may have found such error to exist without any dishonest intention.

If the evidence was on the record, we might look into it, and determine whether the verdict accorded with the proofs; but as the case stands before us, the finding of the jury must be deemed a proper conclusion from the facts proved on the trial.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

F. M. Finch and *S. Major*, for the appellants.

G. M. Overstreet, *A. B. Hunter*, *L. Barbour* and *A. G. Porter*, for the appellee.

THE LAFAYETTE AND INDIANAPOLIS RAILROAD COMPANY v.
SHRINER.

May Term,
1855.

6	141
125	538

THE LAFAYETTE AND INDIANAPOLIS RAILROAD COMPANY v. SHRINER.

6	141
169	182

Section 2 of the act of 1853 to provide compensation to the owners of animals killed or injured by the cars, &c., of any railroad company, &c., excludes from the consideration of the jury, in a suit against any such company for the destruction of stock by their cars, any consideration of the question whether the injury was the result of wilful misconduct or negligence, or of unavoidable accident.

That act is not applicable to a case where the injury is done by the cars at the crossing of a public street in a city, the company having no right to erect a fence thereon.

In a suit, under the common law, against a railroad company, for an injury done by their cars to animals, the question whether the injury was occasioned by negligence, misconduct, or unavoidable accident, is open for the consideration of the jury.

The common law imposes on the owner of domestic animals the duty of keeping them on his own land or within enclosures, and he becomes a wrongdoer if any of them escape or stray off upon the lands of another person.

This, as a general rule, is the law in this state.

If an animal is wrongfully on the track of a railroad, but is injured, while on the same, by the gross negligence or wilful misconduct of the company's agents, the company is liable.

The law requires that a train of cars in passing through a town shall be run with a greater degree of care, and hence at a less rate of speed, than is generally observed in the movement of the train.

APPEAL from the *Tiptecanoe* Court of Common Pleas.

Monday,
May 28.

DAVISON, J.—This action was originally commenced before a justice of the peace, to recover the value of a cow injured and destroyed by a locomotive of said company, while running on their road. The justice gave judgment in favor of *Shriner*, the plaintiff below, for 30 dollars. The company appealed. In the Common Pleas, the Court tried the cause and found for the plaintiff 30 dollars, rendered a judgment in his favor for 60 dollars, and also for a docket-fee of 5 dollars, and costs of suit.

The following are the material facts: The cow described in the complaint was worth 30 dollars, and belonged to *Shriner*. On the 22d of *December*, 1853, she was seen on the track of the *Lafayette and Indianapolis Railroad*, with other cows, within the corporate limits of the town of

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Lafayette, at a place where the track crosses one of the streets of said town. A locomotive and train of cars were then approaching. When some fifty yards from the cows, the whistle of the locomotive was blown in the usual way, but the speed of the train was not slackened. It was going rather faster than usual. All the cows got off the track; but directly afterwards the plaintiff's cow attempted to cross in front of the locomotive, was caught, thrown off the track and greatly injured. No attempt was made to stop the train. After the cow was thrown off it passed on.

The plaintiff resided in *Lafayette*, some squares from the railroad. For two years prior to the time the cow was injured, she had been permitted to go at large during the day, going wherever she pleased, unrestrained, and frequently crossing the railroad track. She was stabled at night.

The general custom of the larger number of persons living in *Lafayette*, and owning cows, was, both before and since the construction of said road, to let them go at large to pasture.

The railroad track is not fenced.

Upon the case made by the evidence, it becomes necessary for us to inquire, whether the injury to the cow arose under circumstances which render the company liable in this action. This is the general question in the case.

An act approved *March 1, 1853*, provides—

1. "That whenever any animal or animals shall be killed or injured by the cars or locomotives, or other carriages used on any railroad in this state," the owner may sue before a justice of the peace.

2. "On the hearing of said cause, the justice or jury trying the same shall give judgment for the plaintiff for the value of the animal destroyed or injury inflicted, without regard to the question whether such injury or destruction was the result of wilful misconduct or negligence, or the result of unavoidable accident.

3. "If the defendant shall appeal from such judgment, and shall not reduce the damages assessed twenty per

cent., the appellate Court shall give judgment for double the amount of damages assessed in such appellate Court, and a docket-fee of five dollars.

4. "This act shall not apply to any railroad securely fenced in and such fence properly maintained by such company." Acts of 1853, p. 113.

It has been decided in *New-York* that "a railroad company, by omitting to fence its road, is not made responsible for injuries done by their locomotive to cattle straying upon their track, through the negligence or carelessness of their owner." *Marsh v. The N. Y. and S. Railroad Company*, 14 Barb. 364.

This case is relied on by the appellant as directly in point. The decision itself may be correct; but it is based upon a statutory provision which seems to be essentially dissimilar to the one above quoted. The *New-York* statute, after requiring railroad companies to erect and maintain fences on the sides of their roads, and cattle-guards at all road crossings, provides that until such fences and cattle-guards shall be made, the corporations and their agents shall respectively be liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals thereon; but after such fences and cattle-guards shall be made, the corporation shall not be liable for any such damages, unless from acts negligently or wilfully done.

This provision the Court, in the case cited, say, renders the companies responsible when they omit to make fences or cattle-guards, if damages are caused by them, whether from carelessness, wilfulness, or inevitable accident; but it does not make them answerable for the negligence or wilful misconduct of those who, from such causes, sustain injury from them.

This may be a correct exposition of the legislative enactment upon which the above decision is founded; but our statute, it seems to us, will admit of no such construction. It provides that judgment shall be given for the plaintiff, "without regard to the question whether such injury or destruction was the result of wilful misconduct or negligence,

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or the result of inevitable accident." As we understand the second provision, it excludes entirely the questions of negligence, unavoidable accident, and even wilful misconduct, from the consideration of the justice or jury trying the cause. In effect, the act declares that these questions shall not be raised by either party, in any case prosecuted under it, when it is shown that the company have omitted to fence their road. *Williams v. The New-Albany and Salem Railroad Company*, 5 Ind. R. 111.

But the main question to be considered is, Does the statute at all apply to the facts of this case? The place where the accident occurred was on a street in *Lafayette*. Could the company rightfully erect a fence at that place? The statute, it is true, allows the road to be securely fenced; but did the legislature intend to authorize railroad companies to enclose streets in a town against the use of the public? Such enclosure would be a nuisance; and a literal construction of the statute in that respect would involve an absurdity. "The reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice and contradiction." 1 Kent's Comm., p. 462. The company could not lawfully erect a fence at the place where the cow was injured; hence, the want of such fence can not be held to have been the cause of the accident.

This case is, therefore, not within the statute. It must be governed by common-law rule, and by that rule all the questions of negligence, wilful misconduct, and inevitable accident, so far as they may arise in the record, are open for consideration. 1 American Railroad Cases 210.—11 Barb. (N. Y.) R. 112.—13 *id.* 390.

But this reasoning leads to a conclusion adverse to the validity of the judgment, because, from the sum recovered, being double the amount found in damages, it is evident that the Court below, in trying the cause and rendering judgment, proceeded under the provisions of the act above quoted. We have seen that these provisions do not apply to the case before us. Hence, the decision must be considered erroneous.

The common law imposes on the owner of domestic animals the duty of keeping them on his own lands, or within enclosures, and he becomes a wrong-doer if any of them escape or stray off upon the lands of another. 3 Blacks. Comm. 209, 211.—*Wells v. Howell*, 19 Johns. R. 385. This, as a general rule, prevails in *Indiana*, and may be held applicable to the facts of this case. *Williams v. The New-Albany and Salem Railroad Co.*, *supra*. The plaintiff might lawfully have driven his cow along the street and across the railroad track, but he had no right, under the circumstances, to permit her to go at large, wherever she pleased, unrestrained, especially when this permission was in the immediate vicinity of a railroad, in a city, where the company owning the road were not allowed to fence it.

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Still, though the cow, when the injury occurred, may have been wrongfully on the track, if the damage resulted from gross negligence or wilful misconduct, on the part of the company's agents, in running the train, such being the proximate cause of the injury, the defendant would be liable. *Davies v. Mann*, 10 Mees. and Welsb. 546.—*Brownell v. Flagler*, 5 Hill 282.—*Inman v. Galt*, 7 B. Monroe 538.—16 Conn. R. 420. But on this point the evidence is too indefinite to produce any conclusion. It states "that the train was running faster than usual;" but its ordinary rate of speed is not shown; hence, the excess in running over what is usual can not be estimated. It may have been so slight as to admit of no weight in the consideration of the cause.

The law requires that a train of cars, in passing through a town, should be run with a greater degree of care, and, in consequence, at a less rate of speed than is generally observed in the movement of the train. But when the evidence says, "that the train was running faster than usual," we are not able to conclude whether it refers to the ordinary speed in passing through the city of *Lafayette*, or usually over the road.

This point in the evidence is, therefore, not susceptible of being weighed with any degree of accuracy, nor does it

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V.
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afford any inference upon which a decision of this case can be rested with safety.

We are of opinion that a new trial should be granted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory and R. Jones, for the appellants.

D. Mace and W. C. Wilson, for the appellee.

THE PRESIDENT AND DIRECTORS OF THE PERU AND INDIANAPOLIS RAILROAD COMPANY *v.* BRADSHAW.

6	146
139	249
139	306

6	146
170	491

Section 3, p. 426, 1 R. S. 1852, which gave to the wife, or in case there was no wife, then to the minor children of a person killed by the negligence or unskilfulness of the officers or servants of a railroad company, &c., a right of action against the company, was repealed by implication by s. 784, p. 205, 2 R. S. 1852.

Monday,
May 28.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—*Minerva Bradshaw*, who was the wife of *George Bradshaw*, brought this action against the *Peru and Indianapolis Railroad Company*, to recover damages for the loss of her husband, who was killed upon the road of said company. She brought the action in her character as widow of said *George*, under sec. 3, p. 426, of the 1 R. S. 1852.

Defences were put in, issues made and tried, and the plaintiff had judgment for 4,000 dollars.

The company appealed to this Court; and contend that the section of the statute under which the suit was brought has been repealed.

The section reads thus, and was enacted the 11th of *May*, 1852.

“Whenever any person shall die from any injury resulting from the negligence or unskilfulness of any of the

officers or servants of any railroad company in this state, or to the insufficiency of, or defect in, such road or bridges thereof, or the cars or locomotives thereon, such company shall be liable in damages to the wife, or if there be no wife, or she shall fail for three months after such death to prosecute, then to the minor child or children of such deceased; or if such deceased be a female, then to the husband, or if there be no husband, or he shall fail for three months to prosecute, then to the minor child or children of such deceased; or if such deceased be a minor, and unmarried, then to the father, or if there be no father, to the mother of such deceased." 1 R. S. 1852, p. 426.

The substance of this section is, that whenever any person shall die from injuries happening through the negligence of a railroad company, a right of action for damages shall exist in favor of certain persons against such company.

This right did not exist at common law. The injury mentioned being tortious and personal, the right, by that law, died with the person. 1 Chit. Pl. 68. The right is created by the statute, and here limited, as we have seen, to an action against railroad companies. But on the 18th day of *June*, 1852, thirty-eight days after the passage of the section above quoted, the legislature extended this right, making it general against all persons, natural and artificial, annexing, however, some modifications and limitations upon its exercise. The following is a copy of the later enactment. 2 R. S., p. 205, sec. 784.

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The two acts quoted are upon the same subject-matter, that is, they both create a right of action in a successor, to

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be pursued by the same system of practice, in the same tribunals, for a tort committed upon a deceased person, and they must be considered together.

The first, as we have said, gives the right of action in such cases, against railroad companies; the second, against all persons.

The first does not regard the question whether the deceased, if living, could have maintained an action for the same tort; the second does.

The first gives the right of action ~~the to~~ widow or other relatives, as the case may happen, and gives the judgment recovered exclusively to the plaintiff in the suit; the second vests the right of action in the legal representative of the deceased, and requires the proceeds of the judgment recovered to be distributed to the widow and heirs, according to the general law of distribution of personal estate.

The first makes no provision for the brothers and sisters and remoter relatives of a deceased minor killed upon a railroad; the second does.

The first does not limit the time in which suit may be brought; the second does.

The first does not limit the amount of damages that may be recovered; the second does.

The second is more comprehensive than the first, covering the whole ground occupied by it, and more.

The two are utterly inconsistent in their provisions, and cannot both be enforced; the latter is much the more reasonable and judicious law, is more in harmony with general principles, furnishes an ample remedy, and, we think, repeals the former.

The case of *Norris v. Crocker et al.*, 13 How. (U. S.) R. 429, we regard as in point. It arose upon the fugitive slave acts of 1793 and 1850. The arguments pro and con, and authorities cited, in that case, are the arguments and authorities respectively in the case before us, and the decision in that case supplies the law for this.

The Court say:

"The fugitive slave law of 1850 does not repeal the 4th section of the act of 1793 in terms; and if it is repealed, it

must be by implication. As a general rule it is not open to controversy, that where a new statute covers the whole subject-matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, then the former statute is repealed by implication; as the provisions of both cannot stand together.

"To ascertain whether there be repugnance, the enactments must be compared."

The comparison is then instituted, and we think any one who will take the trouble to examine it, will discover that the repugnance between those two statutes is less than that between the two provisions now under consideration in our code.

STUART, J.—For the reasons given by me on a similar question in *Spencer v. The State*, 5 Ind. R. 41, I am of opinion that the plaintiff was entitled to recover; and therefore that the judgment should be affirmed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the suit.

L. Barbour and *A. G. Porter*, for the appellants.

T. D. Walpole, *W. Garver* and *R. L. Walpole*, for the appellee.

THE INDIANA CENTRAL RAILWAY COMPANY v. ATKINSON.

A railroad act provided for an appeal from the judgment of a justice of the peace, on an assessment of damages for land taken, &c., "as in other cases." Held, that by reducing the plaintiff's judgment five dollars or more on the appeal, the appellant was entitled to costs.

ERROR to the *Hancock* Circuit Court.

PERKINS, J.—*George Y. Atkinson* made the following claim to damages, before *John Rardin*, a justice of the peace of *Hancock* county, against the *Indiana Central Railway Company*.

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ATKINSON.

Monday,
May 28.

May Term, 1855. *"The complainant makes and files his statement of damages as follows, to wit: George Y. Atkinson claims of the Indiana Central Railway Company for right of way through the west half of the north-east quarter of section two, in township fifteen north, of range seven east, also the east half of the north-west quarter of section two, in township fifteen north, of range seven east, situate in the county of Hancock, and state of Indiana, the following damages, to-wit:*

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For four and a quarter acres of cleared land,	
at 50 dollars per acre,	\$212 50
For two acres of corn and a quarter of an acre	
of wheat,	18 00
For moving 120 rods of fence,	15 00
For making and building 80 rods of new fence,	
and keeping it up for all time to come,	100 00
For cutting off from stock water 23 acres of	
cleared land,	50 00
For cars frightening my horses while cultivat-	
ing five fields that will border on the road,	50 00
<hr/>	
Total damage,	\$445 50
CR.: For supposed benefits that may or might	
accrue to me if the railway should, in course	
of time, be completed,	100 00
<hr/>	

Balance claimed from company, \$345 50"

The parties appeared before the justice, agreed upon three men as appraisers, who examined the premises, &c., and awarded *Atkinson* 150 dollars, for which sum the justice rendered judgment, *June 21, 1851*. The company appealed to the Circuit Court, where there was a jury trial, resulting in a verdict and judgment for *Atkinson*, the plaintiff, of 60 dollars. The defendant thereupon moved the Court to tax the costs of the cause against the plaintiff; the Court denied the motion; and the defendant excepted. The correctness of the ruling upon this motion is the only point presented by counsel in their briefs. We examine it.

In *January, 1847*, the charter of the *Terre-Haute and*

Richmond Railroad Company was granted, the fifteenth section of which provided for the assessment of damages for land taken, &c., before a justice of the peace, on the report of twelve men, instead of three, and authorized an appeal to the Circuit Court "as in other cases," where a re-assessment of damages, on the report of viewers, &c., might be had, and made the judgment of the Court.

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In 1851, the portion of the road contemplated by the above company, extending from *Indianapolis* to the *Ohio* state line, was placed under the authority of a separate corporation called the *Indiana Central Railway Company*, to which was given all the general powers, rights, &c., of the *Terre-Haute and Richmond Railroad Company*.

The appeals, then, from these assessments of damages before justices of the peace, being like "as in other cases," we must look to the general practice for the rules governing them. According to those rules, where, on an appeal from the judgment before the justice to the Circuit Court, the judgment for the plaintiff is reduced 5 dollars or more, the defendant recovers costs. Such being the practice, the defendant should have recovered costs in this case, as the judgment for the plaintiff before the justice was reduced in the Circuit Court in a greater amount than 5 dollars.

The practice, in the case, it will be observed, did not, in regard to the persons assessing the amount of damages before the magistrate, correspond with the statute, but no objection was taken by either party.

The case is argued in this Court upon the question of costs alone, and we decide no other.

The right of appeal to this Court in this class of cases has been settled heretofore. 3 Ind. 253.

Per Curiam.—The judgment is affirmed, except as to the costs, which the Circuit Court is directed to award against *Atkinson*.

D. S. Gooding, T. A. Hendricks and C. H. Test, for the plaintiffs.

T. D. Walpole, for the defendant.

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1855.

STONER v. ELLIS.

STONER
v.
ELLIS.

6 188.
158 402.

Where matters of defence are set up by special plea, before a justice of the peace, which are admissible in evidence under the general issue, inasmuch as the defendant may avail himself of all matters admissible under that issue without plea, it is unimportant whether a motion to reject such special plea is correctly decided or not.

The R. S. 1843 so far removed the distinction which previously prevailed, in regard to the transfer of negotiable paper before and after due, as to hold in the same defences against a note assigned before as against one assigned after maturity.

The declarations of the assignor of a note made while he was the holder, whether that was before or after it became due, were, under the R. S. 1843, admissible in evidence, in a suit by the assignee against the maker, to impeach the consideration.

Evidence will be presumed to have properly been admitted, where the record does not show the contrary.

A material alteration of an instrument made by a party who claims the benefit of it, without the consent of the party against whom it is sought to be enforced, renders it void.

Where the alteration of an instrument is of such a character as to defeat entirely its operation for any purpose, as in the case of the erasure of the signature and seal to a deed, or other instrument, so that, admitting all to be true that appears upon the instrument when produced, it would be void in law, it should be explained, in the first instance, before it should be permitted to go to the jury. In other cases, the instrument should be given in evidence, and should go to the jury, upon the ordinary proof of its execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But if there is neither intrinsic nor extrinsic evidence as to when the alteration was made, the presumption of law is that it was made before or at the execution of the instrument.

In a suit upon a note given in consideration of the assignment of a patent, the defendant, in order to show that no patent had ever been obtained, offered in evidence, against the plaintiff's objection, a certificate of the commissioner of patents, under his seal of office, stating that no such patent had been issued. *Held*, that the certificate was not admissible.

Tuesday,
May 29.

ERROR to the *Delaware* Circuit Court.

GOOKINS, J.—*Stoner*, as assignee of *Casperson*, brought an action against *Ellis*, before a justice of the peace, on a note for 50 dollars. *Ellis* filed certain pleas before the justice, impeaching the consideration of the note. There was a trial before the justice, and judgment for the defendant, from which the plaintiff appealed to the Circuit Court, where the cause was tried with the same result. Before proceeding to trial in the Circuit Court, the plaintiff moved

to set aside the defendant's pleas. The motion was overruled, and the plaintiff excepted. As the matters of defence indicated by the pleas were admissible in evidence under the general issue, of which the defendant may avail himself before a justice, according to the statute, without pleading, it is of no consequence whether the decision upon the motion to reject the pleas was right or wrong.

On the trial, one *Cleft*, a witness for the defendant, was permitted to testify, against the objection of the plaintiff, to certain declarations of the assignor, made before the assignment of the note, tending to impeach the consideration. The plaintiff insists that this testimony was erroneously admitted. It was decided by this Court in the case of *Blount v. Riley*, 3 Ind. R. 471, that the declarations of the assignor of a note, which was assigned after it became due, made while he held it, were admissible in evidence to prove payment. The authorities quoted in that case distinguish between paper negotiable, in the mercantile sense of that term, and that which is assignable by statute. In case of the former, if negotiated before due, the declarations of the payee are not admissible against the holder. It would greatly impair the commercial value of such paper, if it were liable to be attacked in that way. But if negotiated after due, the evidence is admissible. The dishonor of the note casts suspicion upon it; and he who takes it under such circumstances, takes it subject to all defences. He stands, not upon the credit of the bill or note, as a negotiable instrument, but upon the title of the prior holder, and, where a person must recover through the title of another, he is bound by the declarations of the party through whom he claims. 1 Phill. on Ev. 394.—*Blount v. Riley, supra*. In the present case, it does not appear whether the note was assigned before due or afterwards; but it makes no difference. The statute of 1843, p. 577, sec. 8, which governs the case, provides that the maker of a note like this, in an action by the assignee, may set up any defence which he had as against the assignor before notice of the assignment, and which he might have set up against the payee. This removes the distinction

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which prevails in regard to the transfer of negotiable paper before and after due, and lets in the same defence as would be admissible against the holder of such paper, negotiated after maturity. The declarations of *Casperson*, made while he was the owner of the note, were properly admitted in evidence, although it may have been assigned before due.

The witness *Cleft* was also permitted to testify, against the plaintiff's objection, that *Casperson* had showed him a power of attorney from *Huff* and *Myers*, authorizing him to sell a patent right for which the defendant alleged the note was given; which, it is said, was permitting the contents of a written instrument to be proved by parol. Supposing this evidence could, in any view of the case, have injured the plaintiff, we do not think the admission of the evidence, as far as it went, clearly erroneous. It was competent for the defendant to prove the existence of the paper, with a view to letting in secondary evidence, in case of loss of the original, or of the refusal of his adversary to produce it upon notice. The record does not contain all the evidence, and, for aught that appears, the proof, as far as it went, may have been proper for some such purpose. We are not to presume that the Circuit Court committed an error, but if, in any view of the case, the evidence was proper, we are to presume it was admitted correctly. If it was not properly followed up, it was under the control of the Court, and liable to be rejected at the proper time.

The defendant offered in evidence an instrument purporting to be a deed from *Samuel Huff* and *John Myers*, which recited that they had obtained from the *United States* letters patent for certain improvements in the construction of churns, and purporting to assign to the defendant the right to make and vend said improvement in the counties of *Lee* and *Henry*; with a covenant of warranty. Certain erasures appeared in the instrument, immediately following the word "*Henry*," and from the bill of exceptions it appears that the words erased were "*Jefferson, Van Buren, Wappelo, Davis, Appalona, Keokuk*, in the state of *Iowa*." The defendant offered no evidence to explain the

erasures, except what appeared on the face of the paper. They appear to have been made by drawing a pen several times through the words, but leaving them still legible. The paper was admitted in evidence, and the plaintiff excepted, on the ground that the alteration was not explained.

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There are few questions upon which the authorities are more various and conflicting than upon the one presented by this objection. That a material alteration of an instrument, by a party who claims the benefit of it, made without the consent of the party against whom it is sought to be enforced, renders it void, is a proposition too well settled to admit of doubt. But upon whom devolves the burden of proof, that the alteration was made before or after the execution of the instrument, is the difficult question in the case. Sometimes the rule has been stated, in general terms, that the party producing the paper must explain the apparent alteration before it can be given to the jury, the Court assuming to decide, upon inspection of the instrument, that it is *prima facie* invalid. Other authorities have held that the instrument should be given in evidence to the jury, for their inspection, leaving both parties to offer such evidence as they may think proper, touching the alteration; and those authorities which have given the paper to the jury have yet been divided upon the question whether it was *prima facie* void or valid; and consequently putting the burden of proof sometimes upon one party, and sometimes upon the other.

We shall review a few only of the numerous authorities upon this question; but shall refer to a sufficient number of them to show the various positions which have been assumed. Before referring to these authorities, however, we will remark, that a careful examination of what has been *said* and *decided* upon the question, will show, that the particular circumstances of each case have had much influence upon the rule which the Court has adopted; and further, that some of the *American* Courts, in following the *dicta* of *English* judges, have overlooked a distinction

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which prevails there between negotiable and other instruments, arising upon the operation of the stamp act.

In the case of *Rumion v. Crane*, 4 Blackf. 466, which was assumpsit upon a note payable four months after date, a note was given in evidence from which the word "five" had been erased, and "four" inserted. It was held that there was no error; but in that case there was a default which admitted the note as declared on. The inference from the reporter's note in that case, would seem to be, that had the execution of the note been put in issue, it would have devolved upon the plaintiff to prove that the alteration was made before the execution of the instrument. Several *English* authorities, arising upon negotiable instruments, are referred to in support of this view of the subject.

An early case in *New-York*, was that of *Rankin v. Blackwell*, 2 Johns. Cas. 198, in which the alleged alteration was by changing the date of a note on which the suit was brought, and by altering the amount from 300 to 1300 dollars. In that case, it was decided, that the alteration on the face of a note, unsupported by other proof, was not competent evidence to set it aside; but that where such alteration or erasure appeared as rendered the note suspicious, the party against whom it was sought to be enforced might show corroborating circumstances to strengthen the suspicion. This case treats a note apparently altered as *prima facie* valid.

In *Prevost v. Gratz*, 1 Pet. C. C. R. 369, *Washington, J.*, said, "the legal presumption is that an alteration is made after the execution of the instrument. But that case did not rest upon presumption. A trustee for the sale of certain real estate had rendered an account of a sale to one party in interest, by which the tract appeared to have been sold to a person, naming the vendee, and the vendee's name in the account exhibited was written over an erasure. It appeared, however, that he had rendered to *Croghan*, another party in interest, an account identical, in all respects, with the former, in which the name erased appeared as the pur-

chaser. They were both originals, and the altered account was invalidated by the true one.

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In *Jackson v. Osborn*, 2 Wend. 555, it was said that a material alteration in a deed, not noted, was a suspicious circumstance, which required explanation. There were other questions affecting the admissibility of the deed, in this case. It was not properly proved, and an attempt to show that the subscribing witness, by whom the deed had been proved before a commissioner, had been prosecuted for forgery by the party who offered the deed in evidence, had, no doubt, its influence in the ruling of the Court. The alteration was the erasure of the name of one grantee and the insertion of another. The Court in that case said, whether the explanation was sufficient, was a question for the jury.

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In *Newcomb v. Presbrey*, 8 Met. 406, a deed was offered in evidence, from which the signature of the grantor had been erased. The deed had been withheld from record for eight or nine years, and to give it effect, it would have operated as a fraud upon a subsequent purchaser. It was held not admissible, unless explained.

It was said, in the case of the *United States v. Linn*, 1 How. 104, that the law imposes upon the party who claims under the instrument the burden of explaining the alteration; but the point was not in judgment. *Linn*, a land-office receiver, had executed a bond to the *United States*, with *Duncan* and others, his sureties. To an action on the bond, *Duncan* pleaded that after he executed it, the seals were attached. As no alteration appeared on the face of the instrument, there was no ground for any presumption on the subject. For the dictum, *Henman v. Dickenson*, 5 Bing. 183, and *Taylor v. Mosely*, 6 Carr. and Payne 273, are quoted, both of which were upon negotiable instruments.

Wilde v. Armsby, 6 Cush. 314, was an action upon a written guaranty, by which the defendant had undertaken to guarantee certain payments by *George Winchester & Co.*, and the instrument given in evidence had the words "*& Co.*" interlined in a different hand-writing, and with

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a different colored ink from the body of the instrument. The paper was given to the jury, and both parties gave evidence touching the alteration. The jury were instructed that the burden of proof, that the alteration had been made before the execution of the instrument, was upon the plaintiff. In that case, the *English* authorities are cited arising upon negotiable instruments. A *dictum* is also quoted from *Hemming v. Treneery*, 9 Adol. and Ellis 926, which was on a guaranty; but the question as to when the alteration was made, did not arise in the case. It was an action of assumpsit to which non-assumpsit was pleaded; but the case was governed by a rule adopted in 4 *William* 4, which required defences of this kind to be specially pleaded.

The *English* cases, arising upon bills of exchange, proceed upon a wholly different principle from others, owing to the operation of the stamp act. No one doubts that at the common law, the parties may change their contracts at pleasure; but a material alteration, apparent on a bill of exchange, makes it absolutely void, although made with the agreement of both parties, unless it has a new stamp. Accordingly, when a negotiable instrument is offered in evidence, in which an alteration appears, the Court will pronounce it void *per se*, as a fraud upon the revenue, unless it is twice stamped, or unless the party offering it will show that the alteration was made before it was once complete. Such will be found to be the import of the cases of *Bishop v. Chambre*, 3 C. and P. 55; *Johnson v. The Duke of Marlborough*, 2 Stark. R. 313; *Henman v. Dickenson*, 5 Bing. 183; *Taylor v. Mosely*, 6 Carr. and Payne 273; and numerous others. In *Knill v. Williams*, 10 East 431, it appeared affirmatively that the alteration was made by the agreement of the parties; but the note was not allowed to be given in evidence, for the want of a new stamp. The often-quoted language of the *English* Courts, that the plaintiff must prove the alteration to have been made before the instrument was executed, means no more than that he must prove his case. It usually has no

reference to the burden of proof between the parties, as to who made the alteration.

Recent decisions in *New-York* are not uniform. In *Smith v. McGowan*, 3 Barb. S. C. R. 404, it was held that the fact that a deed was written in two different kinds of ink, and that the grantor's name was written over an erasure, was not sufficient to exclude it as evidence, nor was it *prima facie* evidence of an alteration, and that it might be left to the jury, with such explanations as the party offering it might give, either before or after it was read. But in *Tillou v. The Essex Marine Insurance Co.*, 7 *id.* 564, it was said that where an instrument is offered in evidence, the Court is to decide upon its admissibility, particularly in the case of an altered paper, when the alteration makes it void in law; and where the party producing it offers evidence to show a *prima facie* explanation of the mutilation, the question should be submitted to the jury. And again, in *Acker v. Ledyard*, it was said that an altered deed must be explained by a party offering and claiming under it.

A sealed note was found among the papers of the payee, after his death, with the seal carefully cut out, leaving only sufficient to show the character of the instrument. It was held that the destruction of the seal must be considered as the act of the payee, and that it vitiated the note. *Porter v. Doby*, 2 Rich. Eq. 49.

There are numerous other authorities which hold that the presumption of law is, that an alteration is made before or at the execution of the instrument, among which are *Gooch v. Bryant*, 1 Shepley 386; *Crabtree v. Clark*, 7 *id.* 337; *Wickes v. Caulk*, 5 Harr. and J. 36; *Cumberland Bank v. Hall*, 1 Halst. 215; *North River Meadow Co. v. Shrewsbury Church*, 2 N. J. 424; *Beaman's Administrator v. Russell*, 20 Vt. 205; and *Doe d. Tatham v. Catamore*, 5 Eng. Law and Eq. R. 349; which last occurred in the *Queen's Bench* in 1851. The alteration appeared in a lease. Lord C. J. *Campbell* distinguished between deeds and bills of exchange, and quoted from Co. Litt. 225 b, that anciently it had been said that if a deed appeared to

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be razed, or interlined, in places material, the judges held it void, but in later times they had left it to the jury to say whether the alteration was before delivery; and referring to a note upon this passage in *Hargrave* and *Butler's* edition of *Coke* upon *Littleton*, where it is laid down that the interlineation is to be presumed if the contrary is not proved, the Court said that it could not be altered after it was executed without fraud or wrong, and the presumption was against the fraud or wrong.

The alteration of a paper is a question of fact for the jury to try, and we know of no rule, founded in reason, which makes the eyes of the Court any better than those of the jury, upon an inspection of the instrument. The appearance of the alteration, when compared with the other parts of the instrument, may of itself be sufficient to condemn it, and the motive for the change may be deduced from its nature, and the effect upon the party, as being for or against his interest. These circumstances are not to be excluded, and they should be weighed by the jury, with all other evidence either party may offer. The motive in some cases may be apparent, but in others it may not. In general it would scarcely be supposed that a party having custody of a deed would choose to injure his own title by tampering with it; but he might have such inducement. In the present case, the defendant having received a deed for the assignment of a patent, and having become dissatisfied with his purchase, and wishing to defeat a recovery upon his promise to pay for it, might have a motive to mutilate or destroy the deed, and thereby show that his purchase was without consideration. Nothing of the kind appears here. The case is supposed only as an illustration; and the same might occur in respect to a conveyance of land.

We are of the opinion that where the alteration is of such a character as to defeat entirely the operation of the instrument, for any purpose, as in the case of the erasure of the signature and seal to a deed, or other instrument, so that, admitting all to be true that appears upon the instrument, when produced, it would be void in law, it

should be explained in the first instance, before it should be permitted to go to the jury. In other cases, the instrument should be given in evidence, and should go to the jury, upon the ordinary proof of its execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But if there is neither intrinsic nor extrinsic evidence as to when the alteration was made, the presumption of law is, that it was made before or at the execution of the instrument.

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There are some considerations of public policy which seem to us to have weight in inducing this conclusion. With us, the business of conveyancing does not pertain to the legal profession exclusively. Where estates are large, and lands are held by the comparatively few, titles are seldom passed without great consideration, while with us, the ownership of lands in fee is almost universal, and real estate is, like merchandise, a subject of traffic. Deeds are drawn by justices of the peace, and by almost any person of ordinary intelligence, who will observe usually much less accuracy and precision than where the business is in the hands of a branch of the legal profession. The same may be said in regard to all sorts of traffic so common among our people, in which notes, agreements, and other contracts are executed with little regard to professional accuracy. To declare all these *prima facie* fraudulent and void, we are satisfied would be generally indulging in a presumption against the facts, and that it would produce more injustice than to hold them valid. We are of the opinion that the deed was properly admitted in evidence, notwithstanding the erasures were unexplained.

For the purpose of showing that *Huff* and *Myers* had not obtained a patent for the alleged improvement, the Circuit Court admitted in evidence, against the plaintiff's objection, a certificate of the commissioner of patents, under his seal of office, stating that no patent for an improvement in churns had been issued to Messrs. *Huff* and *Myers*. This, we think, was erroneous. If there is any statute authorizing that mode of proof, we have not been able to find it, nor is any referred to by counsel. We are

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aware of no rule of law which authorizes a public officer to certify what does not appear in his office, for the purposes of evidence. His deposition should be taken, to prove that upon diligent search the fact did not appear.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. March, for the plaintiff.

J. S. Buckles, for the defendant.

HARRIS v. PIERCE.

If *A.* execute a note to *B.*, and *C.* indorse the same, parol evidence is admissible to show that *C.* intended to be held as a surety or a guarantor.

A party can not complain of an instruction which is in his favor.

A surety in a note is liable on the default of the principal, without notice.

The insolvency of the maker of a note renders a notice of non-payment to the guarantor unnecessary.

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May 29.

ERROR to the *Wayne* Circuit Court.

GOOKINS, J.—Assumpsit by *Pierce* against *Harris*, on a promissory note made by one *Winebrener*, payable to *Pierce*, and indorsed by *Harris*. The declaration contains six counts. The first charges *Harris* as maker of the note; the second, third and fourth allege that *Harris* indorsed his name on the back of the note, and thereby guaranteed its payment, and that *Winebrener*, at the maturity of the note, was and still remained wholly insolvent. The fifth is like the second, third and fourth, with the additional averment of a special demand of payment upon *Winebrener*, four days after the note became due, and notice to *Harris* of its non-payment. Sixth, a common count for goods sold and delivered. .Plea, non assumpsit. There was a trial by jury, and a verdict for the plaintiff. Motion for a new trial overruled, and judgment. The record does not contain the evidence.

The questions presented by this record arise upon instructions to the jury, the third of which was to the following effect: "If the evidence shows that *Harris*, by indorsing his name on the note, intended to become the surety of *Winebrener* to *Pierce*, he is liable in the same manner as if he had signed his name under *Winebrener's*, on the face of the note."

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There is no error in this instruction. The effect of a blank indorsement of a note by a third party, was considered by this Court, in the cases of *Wells v. Jackson*, 6 Blackf. 40, and *Early v. Foster*, 7 *id.* 35. After citing various authorities, the conclusion arrived at in *Wells v. Jackson*, was, that such indorsement of paper, not negotiable by the law-merchant, was, unexplained, the undertaking of a surety, and that the indorser was liable jointly with the principal. In *Early v. Foster*, the plaintiff declared upon a negotiable note so indorsed, against the maker and indorser as joint makers. A general demurrer to the count was sustained, upon the ground that the unexplained indorsement of mercantile paper, by a third person, must be presumed to be the undertaking of an indorser, with all the rights and incidents of such an undertaking. But in both the cases referred to, it was held that the *prima facie* liability was open to explanation, and that the undertaking might be shown to be in either character.

According to these authorities, it was competent for the plaintiff to show by proof, that *Harris* intended to make himself liable as a surety of *Winebrener*, in the first instance, or that he intended only to guarantee the ultimate payment. We are to presume that there was evidence to which this instruction applied, and it stated the law correctly.

The fourth instruction was to the effect, that if *Harris*, by his indorsement, intended only to guarantee the payment of the note, on the failure of *Winebrener* to pay it, *Harris* would not be liable, unless the plaintiff had demanded payment within a reasonable time after the note became due, or unless *Winebrener* was notoriously insolvent. The first part of this instruction was in favor of

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Harris, and he can not complain of it. The only question he can raise upon it, is, whether the insolvency of the maker rendered a notice of the non-payment to the guarantor unnecessary. Upon this point, we think the authorities settle the question in favor of the ruling of the Circuit Court. *Lewis v. Brewster*, 2 McLean 21.—3 Kent's Comm., 123.—*Reynolds v. Douglass*, 12 Pet. 497.

The fifth instruction was as follows: "If the jury find from the evidence that *Harris* indorsed the note, intending thereby to sign it as a surety, they should find for the plaintiff." The reasons we have given in support of the third instruction apply equally to this.

The sixth instruction was substantially this: "If *Harris* indorsed the note as a guarantor, and a demand was made of *Winebrener*, and notice of the non-payment given to *Harris*, within a reasonable time after the note became due, or if the maker was then notoriously insolvent, the verdict should be for the plaintiff." This does not differ materially from the fourth instruction. These several instructions informed the jury of the difference in law between the contract of suretyship and that of guaranty. The third and fifth suppose *Harris* to have become liable upon the note as a surety jointly with the principal; the fourth and sixth as a guarantor. If his undertaking was that of a surety, as first supposed, he was liable on the default of his principal, without notice; if that of a guarantor, he was entitled to notice of the default of the principal, unless he was insolvent; but if so, the want of notice could do him no harm, and he was liable without it. There was no error in these instructions.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

O. P. Morton and *N. H. Johnson*, for the plaintiff.

J. S. Newman and *J. P. Siddall*, for the defendant.

BUTLER and Others v. THE STATE.

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Indictment against the persons composing the trustees of the *Wabash and Erie Canal*, for a nuisance in erecting a feeder-dam, &c., which was part of said canal. The dam was erected under the act of 1846 to provide for the funded debt of the state, and for the completion of said canal to *Evansville*. No act of wantonness was shown in the erection of the dam. *Held*, that the indictment was not sustained.

The state has exclusive jurisdiction over streams within her territorial limits, which can be navigated only for short distances, at brief periods, by inferior craft, and may obstruct them at pleasure for the public good.

The act of *March 4, 1853*, (*Acts 1853*, p. 17,) clearly manifests the state's intention to remit the punishment for the act on which the indictment in this case is founded; and in a case so anomalous as this, it is not perceived that any principle would be violated by giving it full effect.

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APPEAL from the *Greene* Circuit Court.Tuesday,
May 29.

STUART, J.—Indictment for a nuisance in erecting a feeder-dam, &c. The dam erected was part of the *Wabash and Erie Canal*, and the persons here indicted are the trustees, &c., of that work. Trial by the Court, on an agreed state of facts. Finding and judgment for the state. The evidence agreed upon is all in the record.

The trustees claim the right of erecting the dam, under the authority of a law of the state, entitled "an act to provide for the funded debt of the state of *Indiana*, and for the completion of the *Wabash and Erie Canal to Evansville*." *Gen. Laws, 1846*, p. 1.

The 23d section of that act provides, that "said trustees shall have the right to locate and construct such feeders, feeder-dams, side-cuts, and reservoirs as may be necessary to supply said canal with water, and may take such timber, stone, or other materials as may be necessary for the construction of said canal, by making to the proper owners reasonable compensation therefor, on the same terms and in the same manner as the superintendent of said canal is now authorized by law to do; and the word 'canal,' wherever used in this act, shall be construed to mean and include all its feeders, feeder-dams, side-cuts and reservoirs."

The agreed state of facts discloses no act of wantonness in the erection. It states that there is a lock in the dam, of

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sufficient capacity to admit the passage of vessels of one hundred and five feet long and twenty feet wide, &c.; that the dam was erected by the trustees under the act of 1846, &c., and that it was part of the *Wabash and Erie Canal*, &c.

The act referred to partakes of the nature both of a law and a contract. It could not have been contemplated by the trustees and the state, regarded as contracting parties, that the completion of the "canal," as defined in the foregoing section, might subject them to a criminal prosecution.

But the state has even more than one side of the contract. By the act of 1846, the state is not only a contracting party, but one of the three trustees is an officer of her own selection. As to that trust, he is there, out of abundant caution in the legislative contract, to represent and sustain the interests of the state. She is thus, in some measure, a component part of both sides of this anomalous proceeding. Thus, in the case before us, the state further appears by her attorney prosecuting. And the prosecution is for the very acts of construction which she had authorized to be done—bound the trustees to do; and so far as representation by one of the trustees could go, actually participated in doing.

The prosecution of such acts, under such circumstances, can not be sustained. The position is not to be thought of as a construction of the statutes, civil and criminal, bearing on the subject. It could be neither explained nor justified, consistently with good faith on the part of the state. Its very complexity would give it the appearance of covert repudiation.

Without pretending to say what this anomalous legislative contract, in many of its provisions, does mean, it is not difficult to discover what it does not mean, as applicable to the question before us. Beyond that we will let it be its own interpreter. Its design is matter of public history. And we are clear, alike from the wording of the act itself, from the position of the contracting parties, and from the well-known end to be accomplished, that it was never the

design of the state to subject the trustees to indictment for the simple discharge of a public duty authorized by statute.

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The dam in question may be a great annoyance to some portion of the people of *Greene* county. No doubt it is to some of them a nuisance. But so is the whole canal a nuisance, in the same sense, though perhaps not in the same degree, to some portion of the people in every county through which it is located. Like every artificial pond of fresh water, it must affect more or less injuriously the health of the vicinage throughout its whole length, and obstruct passage to and fro from either side. The argument which would sustain an indictment for the erection of this dam in *Greene* county, would establish a principle of too extensive application. The right of the state to authorize the erection can not be questioned. Over streams within her territorial limits, which can be navigated only for short distances, at brief periods, by inferior craft, the state has exclusive jurisdiction, to obstruct at pleasure for the public good, and no action will lie for such obstruction. *De Pew v. The Board of Trustees, &c.*, 5 Ind. R. 8. The injuries complained of are a necessary result, inseparable from the blessings conferred on the public by means of such a public thoroughfare as the canal. It is proper that such temporary and imperfect modes of conveyance as most of our streams afforded, should be superseded, and others more adapted to the growth and improvement of the state should take their place. In time, no doubt, the canal itself will be supplanted by some other mode of conveyance and passage, commending itself to the public by greater capacity and greater speed. "In a country like ours," says *Taney*, C. J., "free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, and essential to the comfort and prosperity of the people." *Charles River Bridge v. Warren Bridge*, 11 Peters 420. It is not, therefore, consistent with the public policy of the state that such erections as that complained of should be called in question in this mode. When the injury is direct and immediate, such as the taking of timber, stone,

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THE STATE. It is not necessary to intimate an opinion how far, and for what acts in connection with the trust, as, for example, for a wanton execution of the work not called for by the exigencies of the case, an indictment might not be the proper remedy. But the gist of such a prosecution, if it would lie, would not be the construction of the dam, feeders, &c., essential to the canal. That the contract of 1846 has fully authorized. It would be the wanton acts of the agents who transcended the authority conferred by the state, which, alone, could subject them to prosecution. Even then, perhaps, such prosecution would not lie; for if the twenty-sixth section can be construed into a statutory remedy, that alone could be pursued. The twenty-sixth section reads thus: "The state may at any time file her bill in chancery, in the *Marion* or any other Circuit Court in this state, against said trustees, to enjoin them from any violation of said trust, and also to compel them to execute the same."

The rule is this: When a new right is introduced, and a remedy for its violation is prescribed by statute, the party complaining of such violation is confined to the statutory remedy. *Lang v. Scott*, 1 Blackf. 405.—*Almy v. Harris*, 5 J. R. 175.

We do not undertake to say how far this doctrine is applicable to the present case, for it is not a question before us. But if it be applicable, it is clear this indictment will not lie. If it be not applicable, neither will it lie for simply erecting the dam, for there are no such wanton acts complained of as the other hypothesis contemplates.

Of the act of *March 4, 1853*, (Laws 1853, p. 17,) it is perhaps sufficient to say, that it clearly manifests the intention of the state to remit the punishment, even if she had, as we think she had not, any right to inflict it. The power, as well as the policy of such legislation, might present very different questions. But they are not raised. To the expressed intention of the state, in a case so anomalous as this, it is not perceived that any principle will

be violated by giving it full effect. It might perhaps be regarded as equivalent to the repeal of a statute imposing a penalty. *The State v. Youmans*, 5 Ind. R. 280.—*The State v. The Baltimore and Ohio Railroad Co.*, 3 How. 534, and the authorities there cited.

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But we are clear, independent of this enactment, that the indictment cannot be sustained; and, therefore, do not lay much stress upon that act.

Gookins, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

W. D. Griswold, for the appellants.

G. G. Dunn, *N. B. Taylor* and *J. Coburn*, for the state.

MORGAN and Another v. STEVENSON and Another.

A. being called as a juror and examined by the Court, touching his qualifications, said, that he had not formed or expressed an opinion in the case, nor had he formed or expressed an opinion as to which of the parties should succeed; that his mind was free to decide the case according to the evidence, though he had formed an opinion as to some of the matters in controversy. *Held*, that a challenge for cause would not lie.

The refusal of a specific instruction can not be alleged as error, where the instruction was given, substantially, by the Court, in a general charge.

A. and *B.* covenanted with *C.* and *D.* to furnish to the latter, at their distillery, &c., a specified quantity of slop, &c., during, &c., and also to furnish "good and sufficient pens, and keep them in repair, for feeding all the hogs" that the covenantees might wish to feed on the slop so to be furnished by the covenantors. In a suit against the covenantors for not keeping the pens in repair as stipulated, they asked the Court to instruct the jury that they were only bound to keep the pens in "ordinary repair." *Held*, that the instruction was correctly refused.

APPEAL from the Dearborn Circuit Court.

DAVISON, J.—Covenant, upon a contract in writing, whereby *T.* and *D. Morgan*, who were the defendants below, agreed to furnish at their distillery in *New-Lawrenceburgh*, to *Hobbs* and *Stevenson*, the appellees, the slop of

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one hundred and fifty bushels of corn per day, for the space of one year, to commence on the 1st of *March*, 1851, *Sundays* excepted; also excepting unavoidable accidents. The defendants further stipulated that they would furnish good and sufficient pens, and keep them in repair, for feeding all the hogs the said *Hobbs* and *Stevenson* might wish to feed on the slop to be so furnished by the defendants. It is alleged that pursuant to said contract, the plaintiffs, on the 1st of *March*, 1851, put and had in the defendants' pens, at their distillery, nine hundred head of stock hogs, to be fed and fatted in said pens. Among several breaches, the plaintiffs assigned the following: That the defendants did not furnish good and sufficient pens, and keep them in repair for the keeping of said hogs; but that the same were out of repair and insufficient. That they did not furnish slop made from good sound corn; but while the hogs were in said pens, the defendants mashed, used and distilled unsound and rotten corn, and fed said hogs upon the unsound and unwholesome slop therefrom. The defendants' answer led to issues of fact. Verdict and judgment for the plaintiffs.

A bill of exceptions shows that, while impanneling the jury, one *Jonathan Evans* was called, and being challenged by the plaintiffs, was examined before the Court, touching his qualifications as a juror; upon which examination, he said "that he had not formed or expressed an opinion in the case, nor had he formed or expressed any opinion as to which of the parties should succeed; that his mind was free to decide the case according to the evidence, though he had formed an opinion as to some of the matters in controversy." The defendants insisted that *Evans* was a competent juror; but the Court sustained the challenge.

If a person called as a juror has formed an opinion on the merits of the cause, such as would not readily yield to the testimony offered, he would be incompetent. His opinion must, however, be fixed and settled; for if merely light and transient, such as would leave the mind open to a fair construction of the testimony, it would constitute no sufficient objection to the juror. 1 Burr's Trial 416.

McGregg v. The State, 4 Blackf. 101, decides that the challenge of a juror is not sustained, though he had formed and expressed an opinion as to the guilt of the prisoner from report; but had heard no witness speak of the transaction. So in *Van Vacter v. McKillip*, 7 *id.* 578, a juror, being interrogated as to his having formed an opinion in the case, answered, "that he did not know but that he had formed an opinion in the case from rumor, but thought his opinion would readily yield to the evidence, if it should differ from the rumor he had heard." It was held, that the challenge was not well taken. We have recently decided that "a person who has formed an opinion on the merits of a cause, derived from conversation with the witnesses, is incompetent to sit upon the jury." *Goodwin v. Blackley*, 4 Ind. R. 438. In these cases, it will be seen that the reason which led to the pre-opinion of the juror is distinctly stated. But in the present case, the person called simply states that "he had formed an opinion as to some of the matters in controversy;" but "that his mind was still free to decide according to the evidence." The latter statement, it is true, would have no weight, if it appeared that his opinion was the result of ill-will to one of the parties, or grounded upon a knowledge of the facts of the case. But here the proposed juror, in effect, explicitly declares that he stands indifferent. And it seems to us, that in the absence of all evidence leading to the belief that the opinion so formed would not have readily yielded to the testimony to be given on the trial, we must believe what he has said on the subject. Unless this be done, the propriety of examining a juror at all on his *voire dire*, is not obvious. We are advised that the Supreme Court of New-York, in *The People v. Mather*, 4 Wend. 229, is in conflict with the view just taken; but a majority of this Court are not inclined to follow that case.

The party who challenges for cause must show that the juror is not qualified. If the plaintiffs had extended the examination of *Evans*, so that the grounds upon which his opinion was based would have been fully disclosed, it would then have become important to inquire whether

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such grounds were sufficient to produce impressions calculated "to resist the force of the evidence to be offered in opposition to them;" but in the case before us, we have nothing more than the simple statement of the proposed juror, "that his mind was free to decide the case according to the evidence." This statement, being un rebutted, must be taken as true. The result is, the challenge should have been overruled.

The defendants, at the proper time, moved the Court to charge the jury—1. "That if, in consequence of a bad season for growing corn, the crop produced in the year that plaintiffs fed hogs at the defendants' distillery was of an inferior quality, they are not to be held accountable for any loss sustained by the plaintiffs for that cause." 2. "That the defendants were only bound to keep the pens in ordinary repair." These instructions were refused.

The first instruction raises no point in the case, because it was substantially given by the Court in its general charge. The jury were told, that "if the defendants furnished reasonably good corn for the season, that is all that could be required of them." "If they failed to furnish reasonably good corn for the season, they would be responsible for the damages occasioned thereby." The refusal to give the first instruction can not, therefore, be deemed erroneous.

The terms "ordinary repair," used in the second instruction, do not seem to express the spirit and intent of the contract. The defendants bound themselves "to furnish good and sufficient pens, and keep them in good repair." From this, we understand, not only that the pens were to be "good and sufficient," but that they were to be kept in good and sufficient repair. In other words, the defendants were bound to keep the pens in such a condition as would enable the plaintiffs to realize the full benefits to be derived from that stipulation. Such repair as was common or ordinary might not be a fulfilment of the contract.

For the error in sustaining the challenge, this judgment must be reversed.

STUART, J.—I am of opinion that the juror in this case was disqualified. On his examination, he said that “though he had formed an opinion as to some of the matters in controversy, yet that his mind was free to decide according to the evidence.”

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The question here raised directly, was touched incidentally in the case of *Goodwin v. Blachley and Others*, 4 Ind. R. 438.

There are two objections to the reasoning of the Court in the present case, which, to my mind, are conclusive against the ruling. The first relates to the rule or test applied; the second to the qualification of the juror after the application of the test.

1. As to the test to be applied to ascertain the qualification of such a juror. In the opinion of the majority of the Court, it is said, that “in the absence of all evidence leading to the belief that the opinion so formed would not have readily yielded to the evidence given on the trial, we must believe what he has said.”

This is reviving the rule shadowed forth in *McGregg v. The State*, 4 Blackf. 101, that the nature and cause of the opinion should be inquired into, to ascertain whether it be a fixed opinion, or whether it be of a light or transient character. The futility of such a rule was deeply felt by the judge who delivered the opinion in the case of *Goodwin v. Blachley*. But as that point was not directly raised, the inquiry was not pressed. Nor had the authority cited below, at that time, fallen under my notice. Hence, only a doubt of the soundness of such a doctrine was hinted, and a few of the cases going to establish a more rational and practical rule cited.

Since then, the case of *The People v. Mather*, 4 Wend. 229, has been carefully examined, and its reasoning seems to me conclusive against the ruling in *McGregg v. The State*, and the authorities there cited to support it.

The People v. Mather was determined in the Supreme Court of New-York in 1830. *McGregg v. The State* was decided in this Court in 1835. The very cases cited in support of the ruling in our Court, both *English* and *Amer-*

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ican, are cited and reviewed in *Mather's* case, *supra*. The case particularly relied upon in our Court, *The People v. Vermilyea*, (6 Cowen and 7 Cowen,) is reviewed and overruled in a masterly opinion by Mr. Justice *Marcy*. We can not do better than to present the question, as far as may be, in his own words.

"Every change of facts does not necessarily call for a modification of a rule of law. However changed the facts may be, if the reasons for the rule remain, it must be applied. Why is a juror who has formed or expressed an opinion upon the merits, to be set aside in any case? Because he is not supposed to be indifferent to the result. Such an opinion, in presumption of law, is the effect of prejudice or partiality operating on his mind, perhaps without his consciousness.

"We are asked to distinguish between an opinion formed by hearing the testimony of witnesses, and one founded on rumor; and to say that the former shall be evidence of partiality and the latter not. They who believe on the slightest evidence, or no evidence at all, manifest, in my judgment, a state of mind less prepared to receive and allow a fair defence, than those who believe on proof which furnishes *prima facie* evidence of guilt. If in any case it would be safe to admit a juror who had formed an opinion, the presumption of impartiality would certainly be stronger in favor of him who founds his belief on authenticated facts, than of him who has given credence to vague and groundless rumor. If, says C. J. *Marshall*, the juror has made up his opinion, but has not heard the testimony, such an excuse makes the case worse. 1 Burr's Trial 370. The law, I apprehend, attaches the disqualification to the fact of forming and expressing an opinion, and does not look beyond to examine the occasion or weigh the evidence on which that opinion is founded. 1 Burr's Trial 419.—1 Johns. R. 316.—1 Cow. 432." Such is the masterly reasoning of Mr. Justice *Marcy*.

2. On the second point, the reasoning of the same distinguished judge is equally clear and conclusive.

"In the opinion of the witness he had no bias; for

though, if what he had heard were true, he had a fixed opinion of the defendant's guilt, yet if the facts should not be proved, his present belief would be removed. This account of the juror's state of mind is not remarkably perspicuous. Too much stress ought not to be laid on his own declaration, that if the circumstances on which his opinion was founded should not be supported by evidence, his opinion of the defendant's guilt would be removed. The disqualifying bias which the law regards, is one which, in a measure, operates unconsciously on the juror, and leads him to indulge his own feelings, when he thinks he is influenced entirely by the weight of evidence. 1 Chitty Cr. L. 443.—Bac. Ab., tit. Jurors, E. 5. If he is sincerely determined to discard his prejudices, he is not to be received, because the law does not hold him capable of doing so. He will listen, as C. J. *Marshall* has correctly observed, with more favor to that testimony which confirms than to that which would change his opinion. It is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case."

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These views are not expressed thus in the opinion consecutively, because they are interspersed with other observations on matters of practice peculiar to the Courts of *New-York*, in the mode of testing the competence of jurors, and observations on other collateral topics of no interest to us. But they are the substance, somewhat condensed, of the opinion of the Court on that branch of the case. The qualifications of *Martin*, one of the persons presented as a juror and rejected by the Court below, (Judge *Gardner*, now of the Court of Appeals, presiding,) was the point directly in judgment; and it was unanimously decided by the Court in accordance with the views above expressed.

The reasoning of the Court in that case, I fully subscribe to and adopt in this. That the one is a criminal, the other a civil case, can, on principle, make no difference. In every case, it is the constitutional right of the party to have an impartial trial by jury. Constitution, art. 1, sec. 20. It is in vain that in all civil cases the right of trial by

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STEWART v. ENGLISH. For these reasons, and those of a similar character hinted at in *Goodwin v. Blachley*, I am of opinion that the juror was disqualified.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman, for the appellants.

D. S. Major, for the appellees.

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6	176
136	322
136	687
6	176
136	609
136	700
6	176
154	89
156	402

Fraud is never presumed, but must be clearly proved by the party charging it; the presumption being always against bad faith.

Under the R. S. 1843, the question of fraudulent intent was a question of fact and not of law.

In a suit to set aside a conveyance as fraudulent against creditors, it must be shown that the vendee received the conveyance with a fraudulent intent.

The fact that the vendee knew, at the time of the conveyance, that a suit was pending against the debtor to recover judgment for the debt, is not of itself proof of such fraudulent intent.

The law does not prohibit a debtor, in failing circumstances, from making an assignment of his property, with a view of paying his debts, provided he does so for a full consideration and without a fraudulent intent.

The inquiry, in a suit to set aside such a conveyance, should always be, whether the act done was a *bona fide* transaction or a mere trick or contrivance to defeat creditors.

Chancery has no power, in any case, to appropriate choses in action to the payment of a judgment at law.

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ERROR to the *Wabash* Circuit Court.

DAVISON, J.—Bill in chancery. The object of this suit was to reach certain property alleged to have been transferred by *Robert English*, with the intent to hinder and delay the plaintiffs from the collection of a judgment at

law. The material facts, as they appear by the bill of complaint, answers, exhibits and depositions, are these:

In *July*, 1849, *English* bought of the plaintiffs, then merchants in the city of *New-York*, a stock of goods worth 8,780 dollars, for which he executed to them his promissory note, payable in six months. When this note was given, it was verbally agreed between the parties, that they were to wait on him for payment twelve months. He, also, in that month, gave them another note for 413 dollars, payable within sixty days, at the branch bank at *Fort-Wayne*. This note he failed to pay. And in *January*, 1850, about the time the larger note matured, one of the plaintiffs called on *English* at *Lagro, Indiana*, his place of residence, for security on their claim. It was then proposed to extend the time of payment of the notes, provided *English* would give a mortgage on all his real estate. This proposition was accepted; but on application to *English's* wife, she refused to sign the mortgage, and the arrangement was not carried out. Thereupon the notes were placed in the hands of an attorney. On the 13th of *January*, 1850, suit was brought on these notes against *English* in the *Wabash* Circuit Court. On the 20th of said month, process in the cause was served, and on the 20th of the next *March*, the plaintiffs recovered a judgment in said Court against him for 9,291 dollars. Between the commencement of the suit and the judgment, *Donovan* visited *English* at *Lagro*, and, at his solicitation, proposed to loan him a sum of money to pay on the plaintiffs' notes, whereby he might be enabled to procure an extension of payment for the residue. About the 1st of *February*, 1850, they proceeded together to *Fort-Wayne*, where the plaintiffs' attorney resided, and remained at that place three days, during which *English* made an effort to obtain an extension of the debt sued on, but having failed to make any such arrangement, they returned to *Lagro*. After this, in *February*, 1850, *English* sold and conveyed to *Donovan* real property worth 4,649 dollars, and also sold and delivered to him merchandise valued at 11,472 dollars—making a total of 16,121 dollars; and within the same month *En-*

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English sold and conveyed to the said *Roche* a tract of land for 1,800 dollars. The terms of the sale to *Donovan* were 1,500 dollars down, and for the balance he executed his notes, without interest and without security, at twelve, eighteen and twenty-four months. *Roche*, for the land which he purchased, gave his notes upon a similar credit. These sales were at full value. Prior to the 23d of *February*, 1850, *Donovan* removed the merchandise to his place of residence in *Pike* county, and at that date the several deeds to him and *Roche* were duly recorded.

At this period, *English* was largely indebted, was to some extent embarrassed; but his property, at its fair value, was sufficient to pay all his debts. From the evidence, it may be inferred that *Donovan* and *Roche* knew that he was indebted; but there is nothing tending to show that they were at all acquainted with the extent of his liabilities. They had knowledge of the plaintiffs' suit; but *English* had other property, not transferred, more than enough, at its real value, to satisfy any recovery that might be the result of that suit.

The weight of evidence induces the conclusion that *English*, by these sales, intended to raise means to pay all his debts as speedily as possible. We perceive nothing in the record amounting to proof that either *Donovan* or *Roche* knew, believed, or even suspected that *English* intended to delay, hinder, or defraud the plaintiffs.

English, on the 12th of *March*, 1850, executed to *Pettit*, one of the defendants, a deed of trust, whereby he transferred to him for the use of his (*English's*) creditors, the plaintiffs included, choses in action worth, on their face, 18,000 dollars. The notes given by *Donovan* and *Roche* constituted a part of that amount. Also, for the same purpose, he assigned to *Pettit* certain real and personal property, the value of which is not shown, but which appears to have been disposed of by him before this suit was instituted. In the deed of trust, *English* designated certain preferred creditors. The plaintiffs were not named in that class, though the deed provides for the payment of their demand. He also reserved the right of securing and

preferring creditors at home, for small amounts, at any time within six months from the date of the deed. By this deed, it appears that *English* was divested of title to all his property, which, it is shown, was sufficient to cover all his indebtedness existing at the time of the transfer to his trustee.

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On the 1st of *April*, 1850, the plaintiffs sued out a writ of *fiery facias* on their judgment against *English*, which was levied on certain lands as his property. This levy embraced all the lands conveyed by him to *Donovan*. They were afterwards sold by the sheriff to the plaintiffs for 397 dollars, and, on payment of that sum, they received a deed pursuant to the sale. The sheriff, on the 13th of *August*, 1850, made return of said writ, to the effect that he had applied the 397 dollars in payment of a prior execution in favor of *Lyman, Seers & Co.*; that the plaintiffs' execution remained wholly unsatisfied, and, as to it, he returned the same *nulla bona*.

When this suit was brought, *English* was a non-resident. He was notified by publication, and having failed to appear, was defaulted. The other defendants, *Donovan, Roche* and *Pettit*, answered the bill.

The bill prays that the respective deeds executed to *Donovan, Roche* and *Pettit* be declared fraudulent and void, as to the plaintiffs' judgment; that the title to the real estate sold and conveyed to them by the sheriff be confirmed; that the payment of said judgment be decreed; and that the defendants be held to account for all the real and personal property, money and choses in action by them, or either of them, received from *English*; that a receiver be appointed, &c.; that an injunction be awarded, &c.; and for general relief.

Upon a final hearing, the Circuit Court dismissed the bill.

It is a settled rule of law that fraud is never presumed; it must be clearly proved by the party making the charge, for the presumption of law is always against bad faith. *Burr* on Assets 397. It is true, a deed, where it contains "provisions in direct conflict with some established rule or requisite of law," may be deemed void. That principle,

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however, does not apply to the deeds executed to *Donovan* and *Roche*, because, on their face, they wear no illegal aspect. They are in the ordinary form. Hence, they cannot be adjudged fraudulent, unless facts requisite to prove them so can be deduced from extrinsic circumstances. It must be shown that the transfers from *English* to them were received with an intent to aid him in the commission of a fraud, for, without such intent, there can be no fraud on their part; and under our statute, that intent is a question of fact and not of law (1). R. S. 1843, p. 592.—*Hubbs v. Bancroft*, 4 Ind. R. 388.

We are to inquire, then, whether there are any evidences of fraud attending these transfers, which vitiate them. It is said that the vendees knew of the plaintiffs' suit against *English*, and that such knowledge is a circumstance which weighs against the purity of the transaction. We are not of that opinion. *English* may have feared that the suit would result in a sacrifice of his property. He was so advised by the plaintiffs' counsel. The suit may have directed his attention to his other creditors, and prompted him to dispose of his property, that he might be able to do justice to all of them. All this may be inferred from the evidence. Still there is no proof that *Donovan* or *Roche* was, in any degree, acquainted with even that purpose. The mere fact that a suit was pending, afforded, of itself, no proof of fraud on the part of *English*, for a debtor may assign his property after, as well as before, action brought. *Burr on Assets* 76.

Nor does the law prohibit a man in failing circumstances from making such assignments, in view of paying his debts, provided he does so upon full consideration and without a fraudulent intent. But the circumstance that *Donovan* and *Roche* knew of the pending suit is of slight importance, when we look into the whole transaction. *English* sold them only a part of his property; enough remained unsold to satisfy the plaintiffs' demand. None of his creditors, save the plaintiffs, were pressing him. Nor does it appear that his vendees were apprised that he had other creditors.

That the consideration of these sales was full and adequate, is not denied; but it is said that the length of credit, without interest and without security, are circumstances which render the transaction suspicious. The force of this position is not perceived. The amount involved in the purchase considered, there is nothing in the extended time of payment without the scope of an ordinary sale. Nor is it at all unusual to sell property upon credit, and without interest on the purchase-money. These stipulations were involved in the contract, and were as much a part of it as the making of the deeds or the delivery of the property. If the vendees had been men of limited means, unable to meet their engagements, there would be some force in the objection that security on the notes was not required; but that state of case does not accord with the proofs. They were men of sufficient means, and their ability to discharge their notes as they matured could not be questioned. Indeed we perceive nothing in the record that tends to show that the sales in question resulted from any impure motive, either in the vendor or purchaser.

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Again, it is said that the sales were made with the intent to hinder and delay the plaintiffs; that *Donovan* and *Roche* had notice of that intent; and that such intent implies fraud. This view is not supported by the record. We have seen that these sales did not divest *English* of all his property; that enough remained unsold to answer the plaintiffs' demand. It could not, therefore, be inferred from the transaction itself that *English* intended hindrance or delay; nor is there any other point in the evidence tending to prove that his vendees had notice of such intention. The transfers may have had the effect of hindering or delaying the plaintiffs; but was that the purpose for which the assignments were made? The law permits a debtor, even in failing circumstances, to dispose of his property for the benefit of his creditors; and when such honest intention predominates, the mere effect of the act can not be considered unlawful. Any other construction of the statute of frauds, would disaffirm every assignment by an

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insolvent of all his property in trust for his creditors, because its necessary effect is to hinder or delay. It seems to us that the inquiry, in cases like the present, should always be, "whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defeat creditors." *Cadogan v. Kennet*, 1 Cowp. 432.—*The United States v. Hooe*, 3 Cranch 73.—1 Story Eq. Jur., s. 353. We think that *English*, whatever the effect of his course may have been, intended to render full justice to all his creditors, so far as the means within his power would enable him to produce that result.

When this suit was commenced, the property in *Pettit's* hands consisted of choses in action. These the bill seeks to appropriate to the payment of the judgment. Hence, the inquiry results, has a Court of Equity power to grant this species of relief? The plaintiffs assume the ground that "a creditor, having pursued his remedy at law to judgment and execution, may go into equity, and compel discovery and appropriation of his debtor's property, in whosoever hands it has been placed out of the reach of execution at law, and that it makes no difference whether such property consists of choses in action, money or stocks." In support of this position, *Hadden v. Spader*, 20 Johns. 554, is cited; but that case, it is believed, does not accord with the weight of authority on the subject. The doctrine relied on evidently applies where a trustee holds property which would have been tangible by execution, and which he has received under circumstances which show fraud as against creditors. Choses in action, however, are not subject to execution, and consequently not within chancery jurisdiction. But with us, this is no longer an open question. *Shaw v. Aveline*, 5 Ind. R. 380, expressly decides that chancery has no power, in any case, to appropriate choses in action to the payment of a judgment at law. That case was decided after a full consideration of the authorities bearing on the point, and we must, therefore, regard it as a rule of decision in this Court.

The evidence in the cause does not produce in our minds the conclusion that the deed to *Pettit* is void; but if it did,

the view just taken would supersede the inquiry whether it was so or not, because if the deed was set aside, the plaintiffs would not be benefited, as no process of execution, in law or equity, can reach the choses in action. If, as appears by the record, *Donovan*, at the time this suit was instituted, was a non-resident, all its objects might have been legally attained by the simple process of attachment. R. S. 1843, c. 41, art. 1, 2.

Upon the whole, we think the plaintiffs have not made such a case as entitles them to relief in a Court of equity.

STUART, J., having been concerned as counsel, was absent.

Per Curiam.—The decree is affirmed with costs.

J. K. Edgerton and C. Case, for the plaintiffs.

W. Z. Stuart and D. D. Pratt, for the defendants.

(1) The statute of 1852 is similar. 1 R. S. 1852, p. 303.

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When a party designedly produces a false impression, in order to mislead, entrap, or obtain undue advantage over another—in every such case there is fraud—an evil act and an evil intent.

When a party to a contract places a known trust and confidence in the other party, in a mixed question of law and fact, and acts on his opinion, and the party in whom such trust was reposed misleads him, equity will relieve.

Family settlements, to be held sacred, must be made in good faith. Fraud or circumvention is fatal to them. Such compromises, fairly entered into, are binding, whether the uncertainty arises upon matters of fact or of law. But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance relate to the facts or the law. Thus a Court of equity will not sustain a family settlement, where, from a mixture of mistake of title, personal ignorance or liability to imposition, agreements, or acts unadvised, or improvident, or made without due deliberation, are entered into. Nor will such compromises be sustained when it is apparent that the parties did not understand their rights, or the nature of the transaction. In all such cases, Courts of equity will hold the settlement invalid, upon the common equitable principle of protecting those who are unable to protect themselves, and of whom an undue advantage is taken.

To justify the rejection of evidence, it must either be contradicted, or improbable, or obnoxious according to some established legal mode of testing truth.

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6	183
134	413
6	183
130	276
6	183
137	681
6	183
152	131
152	130
6	183
165	88

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Where, in chancery, the prayer of the bill was that the answer should be without oath, an answer under oath had no other effect than as if without oath.

Where the answer was required to be without oath, a preponderance of testimony in support of the bill was sufficient.

Fraud may be deduced not only from deceptive or false representations, but from facts, incidents and circumstances which may be trivial in themselves, but decisive in the given case of a fraudulent design.

If a person with whom a deed is left as an *escrow*, to be delivered to the grantee upon his performance of a particular act, passes it to the latter, before he has performed such act, such possession of the grantee does not import a delivery.

A purchaser of real estate who buys with notice that the title of the vendor is to be disputed for fraud, is entitled to no consideration in a Court of equity, if the fraud be established.

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ERROR to the *Tippecanoe* Court of Common Pleas.

STUART, J.—Bill in chancery by *Matilda Peter* against *Wright, Brandt* and others, to set aside certain conveyances as fraudulent. The Court denied the relief sought, and dismissed the bill at the costs of the complainant. She prosecutes this writ of error.

Both in the pleadings and the argument of counsel, it is to be regretted that such unwonted asperity has been indulged. There is nothing to distinguish this case from many others in which fraud is charged on the one side and denied on the other.

Divested of extraneous matter, the facts legitimately presented for our consideration are, as briefly as may be, these :

Joseph Peter was one of eleven heirs of *William Peter*, deceased, who died some time in 1837, intestate, leaving a large estate, consisting chiefly of lands. Shortly after his death, the heirs made an amicable partition. By this partition *Joseph* was allotted a larger share than the others, because on him was devolved the support of his mother, *Julia Ann Peter*. That share consisted of two hundred and fifty-four acres of land, including the homestead of the late *William Peter*. Under this partition, the heirs executed deeds, and took possession of their respective shares.

It appears that *Julia Ann Peter* released her dower to her son *Joseph*, and took from him a bond dated May 29, 1844, whereby he agreed to deliver to *Julia Ann* one-third

of the products of the farm for six years, and afterwards to support her, &c.

In *May*, 1846, *Joseph Peter* died intestate, leaving the complainant *Matilda* his widow, and *Irvin Peter* his only child and heir at law.

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At the time of the partition, some of the heirs were minors, others *femes covert*. To quiet title and confirm what had been done, a bill in chancery was filed, in which all the heirs were parties, either plaintiffs or defendants. The result of this amicable proceeding was a confirmation of the partition already made, and deeds ordered by the Court to the heirs respectively. Under this proceeding, the title of the father, *Joseph P.*, was confirmed in the son *Irvin*, by commissioner's deed.

This amicable suit was terminated in 1848. In *March*, 1849, *Irvin Peter* died intestate, leaving his mother *Matilda*, the complainant, his sole heir at law. She thus inherited the share of *Joseph*, her husband, subject to his obligation for the support of *Julia Ann Peter*.

Consisting, as that portion did, of the *Peter* homestead, and now in the hands of one connected with the family only by marriage, it seems to have become an object with the heirs, to place it, if possible, in the hands of some of the family. They, therefore, in *April*, soon after the death of *Irvin*, took measures to buy out *Matilda*, or, if that failed, to test her title by law. In this negotiation, *Wright* was employed as their agent, at a contingent fee of 500 dollars.

In *May*, 1849, *Wright* took with him *Burkhalter*, the husband of one of the heirs, and *Snoddy*, a friend of the family, and by their joint influence and persuasion, succeeded in purchasing, for the other heirs, from *Matilda*, for 1,500 dollars. At that time, the value of the land so purchased was variously estimated at from 4,000 to 5,000 dollars. *Matilda* gave the heirs a title-bond, to convey upon the payment of the money.

Three weeks after the date of the bond, *Matilda* filed her bill in chancery to set it aside, as having been obtained

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by fraud. *Wright* and the *Peter* heirs, obligees of the bond, were defendants.

In *September*, 1849, the case was compromised, and the suit dismissed at *Matilda's* costs. In pursuance of this compromise, she deeded to *Wright* for 2,375 dollars cash, and divers other alleged items of consideration, which will be noticed hereafter. The deed was delivered to *Orth*, as an *escrow*, to be delivered to *Wright* upon the payment of the money above named.

That very day *Wright* and the defendant *Brandt* were negotiating about the homestead, and the next day *Brandt* purchased a part of the land for 3,500 dollars. Without any order from *Matilda*, but on the assurance of *Brandt* simply, *Orth* took *Brandt's* note for 1,750 dollars, in lieu of cash; and the deed which he held as an *escrow* was delivered to *Wright*.

In *January*, 1850, *Matilda* filed her present bill to set aside the compromise, alleging that she was induced to make it by fraud. *Wright* and his vendee, *Brandt*, the *Peter* heirs, and two of her former solicitors, are made parties to the bill. The answers are required to be without oath.

The *Peter* heirs are defaulted. *Wright*, *Brandt* and the other defendants answer, denying the several charges in the bill, and denying all fraud, &c.

The whole controversy, therefore, resolves itself into a question of fact, on the weight of evidence.

The *Peter* heirs are charged as confederates. It has been seen that they had severally received their full share of the paternal estate. They had no further claim on the homestead—no shadow of right to *Joseph's* share, as inherited by *Matilda*. Their position, therefore, in employing *Wright* to procure for them *Matilda's* inheritance, either by compromise at an inadequate price, or by law, was aggressive; and in that aggression they were united. They directed *Wright* to use "whatever means he might deem proper and fitting;" to compromise for 1,500 dollars, if he could, if not, to involve her in litigation. He was to have 500 dollars if he succeeded; if he failed, nothing, and to

pay all costs. If this is not champerty, it has some such similitude.

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The contract to this effect is appended in a note for further reference.(1)

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On the other hand, *Matilda* was on the defensive. She was endeavoring to hold what the law had given her. Alone against a number, with even less than the ordinary capacity and shrewdness of her sex in business matters, she is artfully led from one blunder to another, till her property is gone for a very inadequate consideration. Thus situated, she appeals to the Courts to relieve her from contracts into which she alleges she has been induced to enter by fraud.

All the parties to the bill in chancery to set aside the title-bond, are also parties to this bill to set aside the deed to *Wright*. The material parts of the former bill are embraced in this; and the special prayer is for relief against the bond as well as against the deed. The bond and deed are treated as parts of a whole, and the evidence addressed to both accordingly.

To determine accurately the respective rights of the parties, it will be necessary to examine—

1. The validity of the title-bond to the *Peter* heirs.
2. The validity of the deed to *Wright*.

Incidental to these, there are several other questions which will be noticed as they arise.

First, then, the title-bond executed by *Matilda Peter* to the *Peter* heirs in *May*, 1849.

It has been seen that *Irvin Peter* died in *March*, 1849. The very next month, *April*, 1849, *Wright* was employed. He immediately took with him *Burkhalter* and *Snoddy*, to second his overtures of purchase with *Matilda*. This part of the transaction is best told by the witness; premising, as it appears in evidence, that *Wright*, *Snoddy* and *Matilda* were all members of the same communion, and that she, therefore, placed the most implicit confidence in these advisers, who had generously come, as they said, to prevent a family difficulty. *Snoddy*, in substance, says: "Dr. *Wright* and *Henry Burkhalter* called on me and wished me to go with them to Mrs. *Peter's*. We talked about

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her title. I became convinced that *Matilda's* title was that of *Joseph Peter*; but I always supposed *his* title defective. I told *Matilda*, in the presence of *Wright* and *Burkhalter*, that I thought her title was not good, and that she had better take the 1,500 dollars, and escape the litigation threatened her by the *Peter* heirs. I was in utter ignorance, then, that there had been judicial proceedings to supply the deficiency of *Joseph's* deed. Neither *Wright* nor *Burkhalter* informed me that I was in error, though *Wright* had then papers which I afterwards understood to be copies of the records.

"Had I known of the proceedings in Court, I should not have advised her to take 1,500 dollars."

There was policy, at least, in the selection of *Snoddy*, who, ignorant of the facts, was eager to enact the peacemaker; and in whose integrity and friendship *Matilda* had the most undoubting confidence. Advice from such a man might well have misled a stronger mind. He was backed by *Wright*, another brother in the church, and *Burkhalter*, her brother-in-law. Thus beset, and with such advisers, *Matilda* signed the bond in controversy. Having thus sold her property for one-third its value, to avert threatened litigation, the object of the confederacy was accomplished.

In what light the law views such transactions, remains to be seen. In *Smith v. Richards*, 13 Peters 26, it is, says Judge *Barbour*, an ancient and well-established principle, that whenever *suppressio veri* occurs, it is sufficient to set aside a conveyance. Judge *Story* expresses the same thing thus: "Where a party designedly produces a false impression in order to mislead, entrap, or obtain undue advantage over another—in every such case there is fraud;—an evil act with an evil intent." 1 Story Eq. Jurisp. 201. Thus, what *Snoddy* ignorantly stated as to the defect of *Matilda's* title, was knowingly and wrongfully adopted by *Wright*, and, as the evidence shows, artfully urged upon her as an inducement to accept the 1,500 dollars. She placed a known trust and confidence in her advisers, in a mixed question of law and fact, and they misled her. 1 Story Eq. ss. 130, 131, 133.—*Shaeffer v. Sleade*, 7 Blackf. 178.—

The State v. Holloway, 8 Blackf. 45. Nor is this such a family settlement as the books say will be held sacred. Such settlements, to be so upheld, must be made in good faith. Fraud or circumvention is fatal to them.

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Thus it is held by judge *Story* that compromises fairly entered into are binding, whether the uncertainty arises upon matters of fact or of law. But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance relate to the facts or the law. Thus a Court of Equity will not sustain a family settlement where, from a mixture of mistake of title, personal ignorance or liability to imposition, agreements or acts unadvised, or improvident, or made without due deliberation, are entered into. Nor will compromises be sustained when it is apparent that the parties did not understand their rights or the nature of the transaction; as if the heir surrender an unimpeachable title without consideration. In all such cases, Courts of Equity will hold the settlement invalid, upon the common equitable principle of protecting those who are unable to protect themselves, and of whom an undue advantage is taken. 1 Story Eq. Jur., *supra*.

The confederacy of the *Peter* heirs with *Wright* to take advantage of an ignorant woman, and the means resorted to, to consummate the purposes of the confederacy, bring the case before us clearly within the rule laid down by *Story*.

We can therefore have no hesitation in saying that the injurious contract with the *Peter* heirs into which Mrs. *Peter* was drawn, was fraudulent and void.

2. We come, then, to the second question, involving the validity of the deed to *Wright*, and the compromise.

This compromise, which had been advised by counsel, is not altogether an independent transaction. It is a continuation of the confederacy, and tainted in some degree with the fraud which resulted in the execution of the bond. On the part of *Wright*, it was but a revision and adoption of that fraud on his own particular account; for, in the meantime, he had bought out the other defendants.

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On the 24th of *September*, 1849, *Julia Ann* and the *Peter* heirs had joined in a quit-claim deed to *Wright* for the whole property pending in chancery. Concurrently therewith he gave his bond to secure *Julia Ann* the benefit of her maintenance bond; or *whatever he (Wright) should consider equivalent thereto*; and to pay all costs, &c.

Two days after, *September* 26th, 1849, *Orth*, in his answer, says, *Wright* called on him, and, on behalf of himself and the other defendants, renewed the proposition of compromise made and postponed in *July* on account of the cholera. The next day, *Orth* and *Wright* repaired to *Matilda's*.

It would seem, from the evidence, that both *Matilda* and *Orth* were kept in ignorance of the purchase from the *Peter* heirs. Perhaps, in itself, this piece of secrecy would not be entitled to much weight. It might have inclined *Matilda* to compromise, or it might have had the opposite effect, had she known all the facts. But it assumes importance as a link in the chain of that furtive and faithless policy which marked the negotiations of *Wright*, and gives point to the frauds charged.

Closely connected with the secrecy, is the urgency of *Wright* to complete his contracts. When the bond was obtained, the subject was broached, and the fraud accomplished, at a single sitting. So here. Though the proposition to compromise had been made in *July*, *Matilda* hears it for the first time on the 27th of *September*, 1849, and is then allowed thirty or forty minutes to reflect on it and give her answer. It is worthy of note, too, that a blank deed was brought along; and that *Wright*, without getting out of the buggy, but landing *Orth* at *Matilda's*, hastened directly to *Burkhalter's* for the money, as though it were understood. It was all done in an hour or two, and *Matilda* taken from a sick bed, in a buggy, over the *Clinton* county line, to the nearest magistrate, to acknowledge the deed.

The substance of the advice, on this occasion, is thus given by the witness. "The reasons urged by *Orth* to *Matilda* were about these: That if it were not compro-

mised, it would make a long and tedious law-suit; that the testimony of Mrs. *Peter's* case depended chiefly on the evidence of Mr. *Snoddy* and her brother; that one or both might die before the case was settled, and that she would then stand a poor chance of gaining it. *Orth* said to *Matilda* that she knew her health was bad, and she might not live to get any good of it or to see it settled. The first *Orth* said about the compromise was, that we met together last night, and consulted *Matilda's* case some three or four hours, and we came to the conclusion the best she could do would be to compromise. When *Orth* said that they had concluded that was about the best thing she could do, *Matilda* replied, 'If you can't see any better way, I can't.'

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Now, it is to be observed of this advice, that it came clothed with the authority, not of *Orth* alone, but of his associate counsel. "We consulted some three or four hours;" "*we* concluded," &c. The most favorable interpretation of who is meant by "*we*" is, that it was her solicitors. In point of fact, this does not seem to be strictly correct. For in his answer to the charge of such concurrence, made by way of cross bill, *Gregory* positively denies that he had ever been consulted as to the terms of the compromise, and insists that it was settled without his advice. There is no evidence tending to establish the facts thus denied. Further to evince his utter repudiation of it, *Gregory* returned his part of the fee into Court, and actually engaged as associate counsel to set the deed to *Wright* aside for fraud.

It is further to be observed of this advice, that one of the reasons urged why she should compromise, viz., the danger of her witnesses dying before the suit was terminated, though well calculated to impress a woman's inexperienced mind, was very evidently unsound and illusive. For under the practice in chancery in 1849, the evidence was wholly by deposition. The bill was filed in *May*, 1849, and the depositions might have been taken at any time after the subpoenas had been served thirty days, &c. R. 8. 1843, p. 842. The diligence of counsel might have

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placed all contingencies out of the question, by taking the depositions of *Snoddy, &c.*, long before the advice was given. Besides, such advice, for such reasons, was equally applicable before suit was brought, and before expenses were incurred.

One useful corollary, however, flows from this advice, that if *Snoddy* and her brother lived to testify, *Matilda* had a clear case against *Wright* and the *Peter* heirs, in relation to the fraudulent title-bond.

That advice was well calculated to produce, and did produce, a wrong impression. It induced her to accede to a compromise, however, injurious to her interests. Hence the bewildered woman's reply—"if *you* can't see any better way, *I can't.*"

It is no part of our purpose, nor does it lie in our way, to inquire why this advice was given. From whatever motive, it is clear that her mind was thereby bewildered and misled. It is the erroneous impression produced, and the results that flowed from it, with which alone we have to deal. Adopting the language of this Court on a similar occasion, only changing the names—"Even admitting that *Orth* produced the false impression innocently, by mistake—a supposition which his fair general character, perhaps, renders no more than just to him—this consideration does not prevent the application of the principle." *McCormick v. Malin*, 5 Blackf. 509. Much more if misrepresentations were knowingly made and injury resulted, will the law imply a fraudulent intent. *Foster v. Charles*, 6 Bing. 396.

It is urged that this part of the case depends chiefly on *Neyhart's* evidence. Hence an elaborate effort is made to break its force and discredit it. But the basis assumed, viz., the contradictory matter to be found in the answers of *Wright* and *Brandt*, is novel and unauthorized. If they could discredit this witness, they should have done so by some of the known modes of impeachment. His general character for truth was not questioned. No attempt was made to show that he had given a different version at any other time. Nor did the most rigid and skilful cross-

examination by numerous counsel in succession elicit any contradiction. The slight discrepancies between his evidence and that of other witnesses, are no more than may be found wherever men of different capacity and different powers of observation and habits of thought undertake to narrate the same events. Such discrepancies tend as often to confirm as to impair the credibility of a witness. To justify the rejection of evidence, it must be either contradicted, or improbable in itself, or obnoxious according to some established legal mode of testing truth. Thus regarded, *Neyhart's* evidence will bear favorable comparison with other witnesses.

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In this connection, it is proper to notice the rule of evidence applicable to the case. The answers of *Wright* and *Brandt* are put in under oath. But this does not change their legal effect or require any higher evidence. For the prayer of the bill is that they answer without oath. Hence in this as in other civil cases at law, a preponderance of evidence is sufficient.

It appears that concurrently with the deed, *Wright* executed to *Matilda* and delivered to *Orth*, as an *escrow*, a bond of indemnity, the terms of which may throw some light on the good faith of *Wright*. After reciting that whereas the personal property of *Joseph Peter*, deceased, is insufficient to pay the debts, which are thus a lien on the real estate; 2. That *Julia Ann's* bond for maintenance is also a lien; 3. That *Matilda* owes a note of 65 dollars to the administrator of her husband; 4. That *Matilda's* deed to *Wright* warrants against all incumbrances: therefore, *Wright* and his heirs release *Matilda* and her heirs from those covenants, to the extent embraced in the recitals, and agree to save her harmless.

This bond, though not noticed by counsel on either side, seems very suggestive. Is it, for instance, a paper entitled to record? How far would it be notice to subsequent purchasers of the modifications of the covenants contained in the deed? Could *Wright's* assigns, as distinguished from his heirs, (*Williams on Real Property*, 53,) sue *Matilda* for a breach of those covenants? And what security does it

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afford her that *Wright* will save her harmless? If it was intended to secure her, why were not those recitals either embodied in the deed itself and expressly excepted from the operation of the covenants, or their performance secured by mortgage? *Matilda* would then have had some security; as it is, she has none. Nor is it to be supposed that this woman knew or understood a tenth part of the complex bond.

These may seem little things, but they have a meaning. They all favor or tend to favor *Wright*. Thus his release to the *Peter* heirs is without seal. For her maintenance bond, he gives *Julia Ann* whatever he shall deem equivalent thereto. *Matilda* is entrapped with the illusive bond we have been considering. On *Wright's* part, every paper accruing to him is drawn with the utmost exactitude. Even *Brandt's* 1,000 dollar note is secured by mortgage, and the interest payable annually. Such uniformity of advantage on the part of *Wright*, can not be easily accounted for, consistently with good faith.

In cases like this, of numerous and complicated facts, the fraud which should vitiate is generally sought in vain in any one phase of the case. It lurks almost intangibly in the whole transaction. It may be deduced, says *Kent*, not only from deceptive or false representations, but from facts, incidents and circumstances, which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design. 2 *Kent* 484. Hence the significance of all the little advantages so uniformly in favor of *Wright*, at the expense of those with whom he is dealing.

In this light, the details of the compromise give further color to unfavorable inferences. It is insisted that what she was to receive under the compromise was the full value of the land. That sum is made up thus:

<i>Brandt's</i> note,	\$1,750
Her solicitor's fee,	525
Indemnity against the bond to <i>Julia Ann</i> ,	1,500
Assumption of the debts of her husband's estate, ..	500
Her own note to the administrator,	65

\$4,340

This estimate is taken chiefly from the proposition submitted by *Orth* to *Matilda*, as given in evidence, and from *Wright's* bond. It is, in substance, this: *Orth* said he had got them up to 2,300 dollars. We concluded to throw off 50 dollars of our fee, which would leave *Matilda* 1,750 dollars. He then said they were to pay her note of 65 dollars, given to the administrator. The personal estate of *Joseph* would not be sufficient to pay the debts by perhaps 500 dollars. Elsewhere in the evidence, the maintenance bond to *Julia Ann* is estimated at 150 dollars a year, and the probabilities of life at ten years, making 1,500 dollars—in all, 4,340 dollars.

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The answers of *Wright* and *Orth* admit that the 2,375 dollars was to be cash. A tender of *Brandt's* note for part of that sum was no discharge of *Wright's* contract. Such a proposition needs no authority.

It is said that *Matilda* had so agreed with *Brandt*. But it is not proved. *William Brandt*, the son, testifies that *Neyhart* told him so, but that is no evidence against *Matilda*. *Ashby* has it that *Matilda* agreed to wait with *Brandt* till he got ready. *Ohr* that she had sold to *Brandt*; that *Wright's* name was not mentioned. The honesty of all these witnesses may be admitted; but it is clear that their attention and memory are not to be trusted. It is not pretended that there was any memorandum in writing, or any consideration for the alleged promise of *Matilda*. If, therefore, such an understanding were proved, it would be but a *nudum pactum*.

The surrender of the deed to *Wright* has been already alluded to in another connection. Knowing, as he did, that the deed was delivered to *Orth* as an *escrow*, *Wright's* possession of it, under the circumstances in which it was obtained, imports no delivery. In legal contemplation, it was never delivered. The estate still remains in *Matilda*. *Jackson v. Catlin*, 2 Johns. R. 248. Admitting that the acts of *Wright* and *Brandt* imposed upon *Orth*, that does not repair the wrong, nor any the less import fraud, upon *Matilda*. *McCulloch v. Malin*, *supra*.

Next in order is the conditional fee of counsel. The

May Term, 1855. substantial parts of this contract, as applicable to the subsequent facts, are given:

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WRIGHT. "May 16, 1849. \$600. For value received, I promise to pay *Gregory, Orth and Brackett* six hundred dollars, and interest from date, without any relief, &c. The consideration for the above is the employment by me of said *G., O. and B.*, as attorneys at law, to prosecute a suit in chancery on a certain title-bond executed by me about the 1st of *May*, 1849, of the farm on which I now reside, and which fell to me as the heir of *Irvin Peter*, deceased. If the said *G., O. and B.* succeed in getting the bond set aside, upon suit for that purpose brought, then I am, upon termination of such suit, to pay the above note and interest; and in case they do not succeed, I am to pay them nothing. *Matilda Peter.*"

It is not our purpose to allude to this contract further than it seems to bear on the questions involved. It is not champerty, simply because it is not payable out of the thing to be recovered. But it falls so clearly within the reason of the law on that subject, that the Courts might perhaps declare it void as against public policy. It is said that Courts of Equity will give no countenance to contracts which savor of maintenance or champerty, though they may not be within the strict legal limits assigned to these offences. *Prosser v. Edmonds*, 1 Younge and Col. 481. See, also, 4 Kent 449, note *a.*—1 Hawk. P. C. 84.—*Scobey v. Ross*, 5 Ind. 445.

But whatever the law may be touching such contracts, it is very clear, for other reasons, that the payment of this conditional fee by *Wright*, cannot be regarded as a part payment to *Matilda* on the land. For the cash payment of 2,300 dollars, though composed of two items, viz., 1,750 dollars to *Matilda*, the residue to her attorneys, was yet an entirety. The payment of the latter was not sufficient. To have entitled *Wright* to a delivery of the deed, both sums should have been paid. That was essential before the payment of any part to *Orth* could be regarded as a payment to *Matilda*. The one payment, without the other, was not only no payment to her, but in connection with

Wright's possession of the deed, was in direct derogation of her instructions and interests. May Term, 1855.

Even if the validity of the conditional fee be admitted, the 525 dollars being a prominent element in a compromise tainted with fraud, its payment, being made in fraud of *Matilda's* rights, could not be supported in equity. *Chesterfield v. Janssen*, 2 Vesey 125.

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So that the claim of *Orth & Co.* must be determined by the original contract. That instrument, it will be seen, is very explicit. It is only on the successful termination of a suit brought to set aside the bond that they are entitled to 600 dollars and interest. Unless successful, and in that way, she is to pay them nothing. The bill had been filed; but the chief labor of the case, the depositions and argument, aside from the contingency of success, was yet to come, so far as appears here.

In no sense, therefore, could they claim anything under the contract. They could only come in under the doctrine of *Lomax v. Bailey*, and sue *Matilda* for the value of what they had done.

The next item is the 65 dollar note, which *Wright* was to pay. *Daniel Peter*, the administrator, and one of the defendants, is examined as a witness. He testifies that he called on *Matilda* and urged the payment, some months after the compromise, and that she paid the note accordingly.

The next item is the maintenance-bond of *Julia Ann Peter*. That was estimated at 1,500 dollars. But this is clearly extravagant. In the first place, *Burkhalter*, her son-in-law, testifies that she is sixty-five or seventy years old—nearer seventy. Now it may be doubted whether the probabilities of life for a woman of that age, in this climate, are not nearer five than ten years.

In the next place, *Wright* himself has fixed the annual value of the bond. His contract with *Julia Ann* was to secure her rights, under that bond, or *what he should consider equivalent thereto*. That equivalent we find in his co-defendant, *Burkhalter's*, deposition, was the interest on *Brandt's* 1,000 dollar note. Here, then, *Wright* himself has

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fixed the annual value of the bond at 60 dollars. He can not complain if the same value is put upon it in the purchase from *Matilda* which he puts upon it in his dealings with *Julia Ann*. As to him, at least, it is an eminently equitable criterion. Taking 60 dollars for ten years, what was counted to *Matilda* in the compromise at 1,500 dollars, was, *Wright* himself being judge, worth 600 dollars.

The last item is the debts of *Joseph Peter's* estate. In the overtures to *Matilda*, they were estimated at 500 dollars, which were to be paid by *Wright* as part consideration on the purchase. But the administrator, *Daniel Peter*, having acted as such four years, and speaking with a full knowledge of the condition of the estate, testifies that the personal property will nearly, if not quite, pay all the debts.

Such are a few of the *indicia* of fraud and circumvention which the case made in the bill, answers and depositions presents. We are, therefore, equally clear on the second point, viz., that the deed to *Wright* is fraudulent and void.

Brandt's position is well defined. He was a purchaser with full notice. He went to see *Matilda* before he purchased, and both by her and others he was warned of what was coming; that she intended to contest the deed as soon as she was able to go to town. *Brandt* said, "he did not think he would buy the place, for he did not wish to buy trouble." He purchased the homestead the next day for 3,500 dollars, leaving in *Wright's* hands still eighty acres, worth 1,000 dollars.

Being thus a purchaser with notice, *Brandt* is not entitled to any consideration in a Court of Equity.

Per Curiam.—The decree of the Court of Common Pleas is therefore reversed, and the cause remanded to the *Tippecanoe* Circuit Court, with instructions to that Court to enter a decree in this cause in favor of the complainant, *Matilda Peter*, to the following effect, viz.:

1. That her said bond to *Daniel Peter* and others, and her said deed to *Wright*, are found to be fraudulent, and

therefore declared void; and that they be given up to be cancelled, within thirty days. May Term,
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2. That the title to the said several parcels of land in the bond and deed described, and also described in the bill, [here they were described,] and every part thereof, be vested in the said *Matilda*, as fully as though said instruments had not been executed.

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3. That the said defendants, *Wright*, *Brandt* and the *Peter* heirs, [here their names were inserted,] be each of them perpetually enjoined from claiming or setting up any right or title whatever by virtue of said deed and bond, or either of them.

4. And that the costs in the cause be adjudged against the said defendants, *Wright* and the heirs of *William Peter*, deceased, above named.

D. Mace and *W. C. Wilson*, for the plaintiffs.

J. Pettit, *S. A. Huff*, *Z. Baird*, *G. S. Orth*, and *E. H. Brackett*, for the defendants.

(1) The following is the agreement referred to in the text:

"This article of agreement made and entered into this 28th day of April, 1849, between," &c., naming all the *Peter* heirs except *Matilda Peter*, "of the first part, and *Isaac H. Wright*, of the second part, witnesseth, that the said parties of the first part jointly and severally appoint *I. H. Wright* as their agent and attorney, for them and in their behalf and stead, to use whatever means he may deem proper and fitting to have set aside a certain decree in chancery," setting out the substance of the decree of partition among the *Peter* heirs, "Should a suit at law or equity be necessary to finally settle the matter, said *Wright* is to procure such legal counsel and aid as he shall think proper, and to pay all costs and expenses in the case that may properly fall on the party above named," viz., the *Peter* heirs. "The said parties shall each and every one give to said *Wright* such papers and instructions as he may demand, and that may be in their possession and reach. But if said *Wright* shall be able, either with or without suit, to effect a compromise with *Matilda Peter*, widow of *Joseph Peter*, deceased, to such effect as that she will assign all her right, title, claim and demand, both equitable and legal, of, in and to the estate of *Joseph Peter*, deceased, both real and personal, to them, the above-named parties of the first part, jointly to their heirs and assigns, then the said *Wright* is authorized to stipulate with the said *Matilda* to pay her, upon the execution of the deed, the sum of 1,500 dollars, to be paid in joint and equal shares by each of the above parties, each the sum of 150 dollars, making in all the sum of 1,500 dollars. In consideration of the above services by *Wright*, each of the above-named parties do this day execute to *Wright* their note for 50 dollars, due three months after date; and in case *Wright* performs the services above named, and

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either sets aside the decree or effects the compromise with *Matilda*, then said notes will be due and payable on the date named, or whenever the decree shall be finally set aside. But in case said decree can not be set aside or said compromise made, then said notes shall be null and void; and all the costs and trouble in the case shall be at the expense of said *Wright*, without recourse on either of the parties of the first part." Then follow, after some repetition, the names of all the *Peter* heirs, except *Matilda*, and *Wright's* name also—all under seal.

In a memorandum at the bottom, five of the heirs unite in authorizing *Wright* to give *Matilda* 2,000 dollars, by way of compromise.

6	200
129	400
6	200
141	43
142	333
142	563
6	200
145	35

BEARD and Another v. DENNIS.

A., B. and C., being engaged in the sale of agricultural implements in *Richmond*, as partners, purchased the stock of *D. and E.*, who were engaged in the same business in that place, the latter agreeing in writing, in consideration of 350 dollars paid to them, not to resume said business in said place. *A.* afterwards purchased the interests of *B. and C.* in the firm. *D. and E.* took in another partner into their firm and resumed their trade in agricultural implements in said place. *A.* then filed in the Court of Common Pleas a complaint to enjoin *D. and E.* from prosecuting said business in said place.

Held, that the Court of Common Pleas had jurisdiction of the cause.

Held, also, that *B. and C.* were not necessary co-plaintiffs.

Held, also, that the circumstance that *D. and E.* took in another partner, did not authorize them to resume said business.

Held, also, that the restraint imposed by said agreement was reasonable and valid.

A contract in general restraint of trade is void; and no contract in restraint is implied from the mere sale of the good-will of a business.

A contract restraining a party from trading within limits that may, by the Court, be adjudged reasonable and not injurious to the public, is valid.

Such a contract, like other contracts, must be supported by a consideration; but the parties may agree upon what it shall be, so that it is legal; and the mere purchase of the stock in trade of a party, is a sufficient consideration for an agreement of the latter to abstain from carrying on the particular trade in the place where the purchaser is to engage in it.

Where the stipulations in a contract in restraint of trade are divisible, and a part impose reasonable and a part unreasonable restraints, Courts will give effect to the former and not to the latter.

Remedies for the infringement of such contracts exist at law as well as in chancery.

An injunction will lie to restrain the violation of such agreements.

APPEAL from the *Wayne* Court of Common Pleas.

May Term,
1855.

PERKINS, J.—Complaint in the *Wayne* Common Pleas by *Dennis* against *Beard* and *Sinex*, asking an injunction. Injunction granted. Appeal to this Court.

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v.
DENNIS.

The case may be shortly stated as follows :

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May 29.

Dennis, *Mumford* and *Hooker*, partners, were largely engaged in the city of *Richmond, Indiana*, in the sale of agricultural implements. *Beard* and *Sinex* were in the same trade, in the same place. They sold out their stock on hand to *Dennis & Co.*, and agreed not to resume the same business in the city of *Richmond*, for the consideration, in round numbers, of 350 dollars. This agreement was in writing. The consideration was paid. Afterwards, *Dennis* bought out *Mumford* and *Hooker*, and carried on the business himself. *Beard* and *Sinex* took in an additional partner by the name of *Dunn*, and resumed their trade in agricultural implements. *Dennis* filed this complaint for the purpose of having them perpetually enjoined from prosecuting that trade in the city of *Richmond*, and nothing more. He did not seek an account and compensation.

The appellants object that the Court of Common Pleas had not jurisdiction of the cause. It is expressly conferred by statute. 2 R. S., p. 19, s. 21, and p. 59, s. 136.

They object that it is not *Beard* and *Sinex*, but *Beard*, *Sinex* and *Dunn*, who are carrying on the business, and hence, that there is no violation of the agreement to discontinue trade made by *Beard* and *Sinex*.

It is too plain for argument, that the latter persons can not escape the effect of this contract, if it is otherwise valid, by merely taking in an additional, perhaps nominal, partner.

They also object that *Dennis* can not maintain this proceeding in his own name, but must, if at all, prosecute in the name of *Dennis*, *Mumford* and *Hooker*.

As the complaint is simply to obtain an injunction, we think *Dennis* can maintain it in his name alone. The injunction is to operate for his benefit—he seems to be alone interested in its existence. But were he not, it is, when granted on his application, just as serviceable to *Mumford*

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and *Hooker*, as though obtained on the joint application of all three of the parties, and no more detrimental to the appellants. Had the complaint sought to obtain compensation or damages, as the legal interest in the contract made the foundation of the proceeding is in *Dennis, Mumford* and *Hooker*, it would probably have been necessary, even in this equitable proceeding, to have made them all parties, that it might bar any other suit by them for that purpose.

The remaining inquiry is, Can the remedy adopted be had upon the contract in question? Anciently the common law strongly discountenanced all contracts in restraint of trade. In one of the earliest cases of which we have an account, (Year Book, 2 Hen. 5,) where a dyer was bound not to exercise his craft for two years, *Hull, J.*, not only held the bond void as against the common law, but added, "by God, if the plaintiff were here, he should go to prison till he had paid a fine to the king." *Claggett v. Bachelor*, Owen 143.—Cro. Eliz. 872. But views as to policy have undergone a change upon this subject. In 1711, occurred the case of *Mitchell v. Reynolds*, regarded as the leading authority in this branch of the law. It is reported in 1 P. Williams 181, and given in the first volume of the *American* edition of *Smith's Leading Cases*, at side-page 172. Judge *Parker* delivered an elaborate opinion, collecting and classifying the previous cases bearing upon the subject, and coming to the conclusion, that a "promise to restrain one's self from trading in a particular place, if made upon a reasonable consideration, is good; *secus*, if it be on no reasonable consideration, or to restrain a man from trading at all." Under this decision it was regarded, till the case of *Hitchcock v. Coker*, cited below, as a question for the Court, in every instance, to determine whether the consideration for the promise was reasonable or adequate; but the law of the case of *Mitchell v. Reynolds* has been subsequently modified, and, as *Parke, B.*, states colloquially, in the argument by counsel in *Green v. Price*, 13 M. & W. 695, "all that doctrine about the adequacy of the consideration has been upset by *Hitchcock v. Coker*, 1 Scott, N. R. 123; 1 Man. and G. 195; and the true ques-

tion now is, whether the contract is injurious to the public or not. If it be, it is void; if it be not, the parties may contract for what consideration they please." May Term,
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Latterly cases have multiplied upon this class of contracts, and the state of the law upon it, at present, may be briefly stated thus :

1. That a contract in general restraint of trade is void; and that no contract in restraint is implied from the mere sale of the good-will of a business.

2. That a contract restraining a party from trading within limits that may, by the Court, be adjudged reasonable and not injurious to the public, is valid. *Avery v. Langford*, 1 Kay 663, (Eng. V. Ch. 1854.) In *Ward v. Byrne*, 5 M. & W. 548, the doctrine was carried to the extent of holding, where a person had agreed that he would not follow or be employed in the business of a coal merchant for, &c., that he not only could not set up the business for himself, but that he could not act in it as clerk for another, nor could he act as soliciting agent. *Turner v. Evans*, 2 E. & B. 512; (75 E. C. L. R.) See *Miller v. Elliott*, 1 Ind. R. 484; *Taylor v. Owen and Others*, *Taylor v. Moffatt*, and *Taylor v. Moffatt and Others*, 2 Blackf., pages 301 to 308, inclusive.

3. That such contract must be, like contracts generally, upon a consideration; but that the parties may agree upon what it shall be, so that it is legal; and that the mere purchase of the stock in trade of a party is a sufficient consideration for that party's agreement to abstain from carrying on the particular trade in the place where the purchaser is to engage in it. *Green v. Price*, *supra*.—*Pierce v. Woodward*, 6 Pick. 206.

4. That where the stipulations in a contract are divisible, and a part impose reasonable and a part unreasonable restraints, Courts will give effect to the former and not to the latter. *Lange v. Werk*, 2 Ohio State R. 519.—*Mallan v. May*, 11 M. & W. 653.—*Chesman v. Nainby*, 2 Ld. Raym. 1456.—2 Stra. 739.

5. That remedies exist at law and in chancery. Those at law need not be specified. In chancery are :

1. Certainly, injunctions restraining violations of such

May Term, 1855. agreements. *Williams v. Williams*, 2 Swanston's Ch. R. 253, and the numerous cases cited in a note in 3 Dan. Ch. Pr. (Perk. ed.) 1875.—*Holden's Administrator v. McMakin*, 1 Parson's Select Eq. Cases, 270. And,

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2. Perhaps decrees for specific performance. Note to *Williams v. Williams*, *supra*.

In 1820, Lord *Eldon* said, in *Baxter v. Conolly*, but it was not necessary to decide, that a Court would not execute a contract for the sale of a good-will of a trade. 1 Jac. and W.'s Ch. R. 576.

In 1822, Sir *John Leach*, Vice Chancellor, decreed a specific performance of an agreement for such sale. *Bryson v. Whitehead*, 1 Simons and Stuart 74.

And, in 1826, Lord *Gifford*, Master of the Rolls, in *Coslake v. Till*, 1 Russ. Ch. R. 376, a case in which the point did not arise, put a *quære* as to whether a Court of Equity would decree a specific performance of such a contract. He noticed the *dictum* of Lord Chancellor *Eldon*, in *Baxter v. Conolly*, *supra*, but made no reference to the express decision of Sir *John Leach*, above referred to.

It is not our purpose to intimate any opinion on this point, but simply to note the cases bearing upon it.

Proceeding now to apply the law to the case under consideration, we find that the contract of sale was executed, the restraint coupled with it limited to the city of *Richmond*, as to territory, but was indefinite as to time. The contract was made in *June*, 1853. The consideration, we have seen, was sufficient, the law gives the remedy resorted to, and the only remaining question is, was the restraint reasonable?

In *Mallan and Another v. May*, *supra*, the rule is laid down, that "every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made, is unreasonable and void, as injurious to the public on the ground of public policy."

This rule we think correct, and tested by it, the restraint, in the case before us, can not be considered as too large as to space. And in *Hitchcock v. Coker*, *supra*, and *Archer v.*

Marsh, 6 Adolph. & Ellis 959, it is decided that indefiniteness as to time alone is no objection.

Looking at the whole case, then, we think the contract under consideration reasonable and valid. Its existence rendered the partnership establishment of *Dennis, Mumford* and *Hooker* more valuable. That value would enter into the consideration of the sale and purchase of that establishment, and entitle the purchaser to the benefit of the agreement to exclude *Beard* and *Sinex* from setting up the same business. Coll. on Part. (Perk. ed.) p. 148. Hence *Dennis* should be entitled to relief.

Per Curiam.—The judgment is affirmed with costs.

J. B. Julian and *W. P. Benton*, for the appellants.

W. A. Bickle and *O. P. Morton*, for the appellees.

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RAILROAD COMPANY
v.
BACON.

THE MADISON AND INDIANAPOLIS RAILROAD COMPANY v.
BACON.

6 205
139 366

A principal is not liable to one of his servants for injuries sustained through the negligence of another servant, when both are engaged in the same business.

Complaint by a widow against a railroad company, to recover damages for the loss of her husband, who was killed, as the complaint alleged, while traveling as a passenger in one of the defendants' cars. Answer, that the husband was not a passenger, but a servant of the company, and that the accident by which he lost his life happened through the negligence of his fellow-servants acting with him in the management of the train. *Held*, that the answer was sufficient.

Section 3, p. 426, 1 R. S. 1852, which gave to the wife, or in case there was no wife, then to the minor children of a person killed by the negligence or unskillfulness of the officers or servants of a railroad company, &c., a right of action against the company, was repealed by implication by s. 784, p. 205, 2 R. S. 1852.

APPEAL from the *Marion* Circuit Court.

Tuesday,
May 29.

PERKINS, J.—Suit by *Euphemia W. Bacon*, as the widow of *Horace Bacon*, deceased, against the *Madison and Indian-*

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apolis Railroad Company, to recover damages for the loss of her husband, killed on said road while travelling, she alleges in her declaration, as a passenger in the car of the company. The seventh defence set up in the answer of the company alleges, that *Bacon* was not a passenger, but a servant of the company, and that the accident by which he lost his life happened through the negligence of his fellow servants acting with him in the management of the train. The plaintiff demurred to this paragraph of the answer, the Court sustained the demurrer, and, as to this defence, the plaintiff had judgment.

Other defences were put in, issues were formed upon them and tried, and the plaintiff recovered a verdict and judgment for 3,000 dollars.

None of the issues tried covered the seventh ground of defence; and the ruling of the Court in sustaining a demurrer to that, presents, therefore, to this Court, the question, whether a principal is liable to one of his servants for injuries sustained through the negligence of another servant, when both are engaged in the same business. This broad general question was left undecided in *Gillenwater v. The Madison and Indianapolis Railroad Company*, 5 Ind. R. 339, though some of the qualifications to which it must necessarily be subject were there pointed out. With those we have here nothing to do. The present case presents but the general proposition, and upon it the authorities are almost concurrent. They decide that the principal is not, under such circumstances, liable. The question was first raised, and thus decided, in the *English* Court of *Exchequer*, in 1837. The same principle was affirmed by the Court of Appeals in *South Carolina*, in 1841. Subsequently, also, it was affirmed in the Supreme Court of *Massachusetts*; and, in 1846, it received the sanction of the Supreme Court of *Georgia*, in *Scudder v. Woodbridge*, 1 Kelly 195. *Lumpkin, J.*, in delivering what appears to be the unanimous decision of the Court, says, the general doctrine "is distinctly laid down in *Story* on Agency, and other elementary writers, and fully sanctioned by the adjudications adduced from *South Carolina*, *Massachusetts*,

New-York and England. 1 McMullen's Law Rep. 385.—4 Met. 49.—6 Hill R. 592.—*Priestly v. Fowler*, 3 Mees. and Welsb. 1. And we are disposed to recognize and adopt it, with the cautious limitations and restrictions in those cases." The Court, however, held that the doctrine did not apply to cases where slaves were the servants, but only where they were free white agents.

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In 1851, the principle of the above decisions received the unanimous approval of the Court of Appeals in *New-York*. 1 Selden R. 492. It has been re-affirmed in *Massachusetts*; 3 Cush. 370; and repeatedly by the *English Exchequer*, the adjudication upon the question in that Court that has last come to our notice being in 1854. *Skip v. The Eastern Counties Railway Company*, 24 Law and Eq. Rep. 396. In that case, the previous decisions are cited; but no case appears in which the doctrine has been controverted. We may well conclude, therefore, that no Court in *England* has questioned it. The Courts in *Scotland* hold differently, but that country is governed mainly by the civil, not the common law, and the decisions of her Courts are not authority here.

The editors of the *American Railway Cases*, vol. 1, p. 569, assert that the Supreme Court of *Ohio*, in *The Little Miami Railroad Company v. Stevens*, 20 Ohio R. 415, have rejected this doctrine; but they are mistaken. The Supreme Court of *Ohio* was, at that time, composed of four judges. Three of them delivered opinions in the case. Judge *Spaulding*, in his, endorsed to the fullest extent the cases cited above, and said—"If these authorities, in both *England* and the states of this *Union*, do not establish and settle this question, then I think it can not be settled by authority; especially when there is no well-adjudicated case to the contrary." Judge *Hitchcock* said, in his opinion, that the case they were deciding did not conflict "at all with the authorities" cited from *England* and the states of the *Union*. The case, he said, rested on different grounds from those. "If," said he, "this case were, in its principal features, like any one of those reported and referred to, I should hesitate long before I would consent to

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disregard those decisions." Here, then, we have one-half of the Court refusing to repudiate the doctrine of the *English* and *American* cases cited, which shows the incorrectness of the statement in the volume of *Railway Cases* cited. But this is not all. Judge *Caldwell*, who delivered the remaining opinion, and does dissent from the doctrine of the *English* and *American* cases, adds—"It is to be noticed, that in both these cases [the *Massachusetts* and *South Carolina* cases] the facts differ in some particulars from the present;" thus conceding that the decision of it, as judge *Hitchcock* asserted, did not necessarily conflict with those cases. The remaining judge concurred in the result, but delivered no opinion. He may have been governed by the views of judge *Hitchcock*, and, hence, refused to repudiate the *Farwell* and other cases. We have sufficient authority, therefore, to say that the case in *Ohio* furnishes no more than the *dictum* of a single judge against those cases, and none at all for saying it furnishes an opinion of the Court against them.

Many rules of law are established, to a greater or less extent, upon considerations of public policy. It is on such considerations that common carriers are held, as between themselves and strangers, indeed to the public generally dealing with them as such, to rigid accountability. On the other hand, it is considered that public policy requires that servants engaged in a common employment should not have an action against their principal for injuries resulting from the negligence of one or more of such servants; because the tendency of such a doctrine is to make them anxious and watchful, and interested for the faithful conduct of each other, and careful to induce it; while the opposite doctrine would tend in a different direction. The safety and welfare of the public, therefore, demand the establishment of the non-liability principle on the part of the employer in such cases; while, when established, it can work no injury to the servant, because his entering upon the service is voluntary, is with a knowledge of its hazards, and with a power and right to demand such wages as he shall deem compensatory. In this view, the doctrine so

fully established by the authorities, receives the approval of our judgment. May Term,
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The Court below erred in sustaining the demurrer, and the judgment must be reversed for that reason. MOORE
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But the action being based upon the same statute as was that of the *Peru and Indianapolis Railroad Company v. Bradshaw*, decided at the present term, (*ante*, p. 146,) it must, under the ruling of the majority of the Court in that case, necessarily be dismissed in the Court below.

STUART, J., dissented.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. G. Marshall, W. M. Dunn and S. Yandes, for the appellants.

D. Wallace, E. Coburn and W. Wallace, for the appellee.

MOORE and Others v. McCLINTOCK.

Where to a bill in chancery an answer under oath was waived, under the statute, the effect of a denial in the answer was to require the allegations of the bill to be sustained by a preponderance of evidence only.

APPEAL from the *Grant* Circuit Court.

GOOKINS, J.—*Mc Clintock* brought his bill in chancery against *Patterson Moore* and *Archibald Moore*, to set aside certain conveyances of land, alleged to be fraudulent, and to subject the land to the payment of a judgment he held as assignee of one *Briggs*.

The material allegations in the bill and an amendment thereto, are, that in *April*, 1845, *Briggs* obtained a judgment against *John Moore*, father of the appellants, in the *Grant* Circuit Court, for 180 dollars, which he assigned to *Mc Clintock* in *October* of that year; that in *April*, 1846,

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McClintock sued out a *fi. fa.* upon said judgment, which was returned *nulla bona*; that *John Moore* had no property except the land in question. The bill further states that in 1841, said *John Moore* was the owner of eighty acres of land, which is described, situated in said county of *Grant*, which he then mortgaged to one *Curtis*, to secure the payment of a debt of 91 dollars and 50 cents; that *Curtis*, at the *April* term, 1844, of the *Grant* Circuit Court, obtained a decree of foreclosure upon said mortgage against *John Moore*, under which the land in question was sold at sheriff's sale, on the 24th of *July*, 1844, to one *Sayre*, for 426 dollars and 68 cents; that after satisfying the execution, the overplus was paid by the sheriff to said *John Moore*, amounting to 307 dollars and 92 cents; that the sheriff conveyed the land to *Sayre*, in trust for the said *John Moore*, to be disposed of as he should thereafter direct, with intent to defraud *Moore's* creditors, and particularly the complainant; and that the claim of *Briggs* was then a subsisting debt. It is further alleged that said *John Moore* agreed to repay to *Sayre* the money he paid for the land; and that *Sayre*, at the instance of *John Moore*, on the 28th of *August*, 1844, conveyed the land to *Patterson Moore*, without consideration, or, if any, it was the same moneys *Sayre* had paid to the sheriff, for the use of *John Moore*; that *Patterson Moore* was then a young man, just arrived at twenty-one years of age, and without property or means of making said purchase; that the conveyance to him was the result of a fraudulent collusion between him and his father, and that he held the land as trustee. The bill further charged that *Patterson Moore*, on the 1st of *March*, 1850, conveyed the land, with a like fraudulent intent, and without consideration, to his brother, *Archibald Moore*, who had notice of the previous fraudulent transaction. It is further alleged that before the last-mentioned conveyance, on the 5th day of *February*, 1850, the honorable *Jeremiah Smith*, then president judge of the eleventh judicial circuit, having an interest in the judgment recovered by *Briggs* against *John Moore* (which is shown), and *McClintock*, filed their bill in the *Wabash* Cir-

cuit Court, (the county of *Wabash* being in another circuit, and adjoining the eleventh circuit,) which bill was the same as the present bill, except that judge *Smith* was a party complainant, whose official character was shown by the bill, and *Patterson Moore* only was defendant. That process was served on *Patterson Moore* on the 5th day of *February*, 1850, and that said cause was continued in the *Wabash* Circuit Court, until the 15th day of *March*, 1850, when it was dismissed, which the defendants well knew.

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Patterson Moore answered, admitting the recovery of the judgment by *Briggs* against *John Moore*; but he denies that the debt in favor of *Briggs* existed when he obtained the conveyance from *Sayre* of the land in controversy. He admits the assignment of *Briggs'* judgment to *McClintock*; but denies the execution and return of *nulla bona* thereon, and *John Moore's* insolvency, as alleged in the bill. He admits *John Moore's* title to the land, his mortgage to *Curtis*, its foreclosure, and the sale to *Sayre*; but denies that he purchased at *John Moore's* instance, or upon the trust alleged in the bill, or for the purpose of defrauding his creditors, but says the purchase was *bona fide*. He admits the conveyance of the land to him by *Sayre*; but denies that it was without consideration, or that the only consideration was the money which *Sayre* had paid to *John Moore*. He admits that he attained twenty-one years of age *November 9*, 1842; but says that his father had given him his time, and released him from his control three or four years before attaining his majority, during which time he had accumulated property worth 400 or 500 dollars. He avers that he paid *Sayre* 600 dollars for the land, a part of which was by conveying to him the undivided half of a tract which he owned, and for the residue he paid him 200 dollars, part of which he obtained from his father on a previous indebtedness. He admits his conveyance of the land to *Archibald Moore*, but denies all the facts alleged in the bill tending to impeach that conveyance for fraud. He admits the filing and pendency of the bill in the *Wabash* Circuit Court as

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McCLINTOCK. The answer of *Archibald Moore* does not differ materially from that of his co-defendant. He avers that his purchase was for a valuable consideration, without any knowledge or notice of the alleged fraud, avers the payment of most, but not all, of the purchase-money, &c.

The complainant waived the oath of the defendants to their answers, pursuant to the statute; and the effect of the denial in the answers was to require the allegations of the bill to be sustained by a preponderance of evidence only.

Sayre testified that he bought the land in question at the sheriff's sale, at *John Moore's* request, and on his promise to refund the purchase-money within ten days, which he failed to do; that he paid for it mostly in *Indiana* bank-notes, on about fifteen of which he had a private mark; that within a month or six weeks afterwards, he conveyed the land to *Patterson Moore*, in exchange for land conveyed to him by *Moore*, receiving about 200 dollars for the difference, in bank-notes which he believed to be those he had paid *John Moore*, ten or twelve of which he recognized by his private mark.

Hugh M. Stevenson testified that in 1842 *Patterson Moore* was a young man, about twenty; that between 1842 and 1844, *John Moore* became indebted to him for a bill of costs, amounting to about 15 dollars. In 1845, he told *Patterson Moore* he intended to proceed against this land for his costs; that he believed he could prove the conveyance to him to be fraudulent; when he promised to pay his debt, and subsequently paid it. *John Moore* was reputed good in 1841 or 1842, but in 1844 or 1845 was understood to be insolvent. He did not know of *Patterson Moore* owning any property, or having any other means than what was about his father's farm.

Jacob Line testified that in 1847, *John Moore* was very much involved, and in doubtful circumstances; that *Patterson Moore* was then a young man, living with his father; that he owned no land that witness knew of; that he might

have had some small amount of personal property; that he was present at the execution of the deed from *Patterson* to *Archibald Moore*, and that no consideration was paid at that time.

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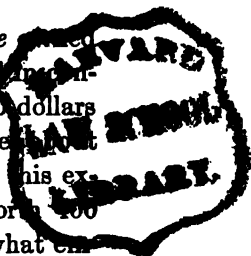
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John Brownlee proved the pendency and dismissal of the bill in the *Wabash* Circuit Court, the identity of the parties (except judge *Smith* and *Archibald Moore*.) and of the subject-matter, as stated in the bill.

This was all the testimony offered for the complainant.

For the defendants, *Abraham Bish* testified that from 1842 to 1845, there was considerable property on the premises of *John Moore*, but he did not know who owned it. It was worth, at a low estimate, 200 dollars. The land in question was then worth from 600 to 800 dollars, and the land which *Patterson Moore* alleges he conveyed to *Sayre* was worth 350 dollars in 1844. He was the nearest neighbor of *John Moore*, and had a tolerably accurate knowledge of his indebtedness, which he thought did not exceed about 500 dollars at that time; and that besides the land in dispute, another tract was worth 350 dollars, of which he owned the undivided half.

Andrew J. Harlan testified that *Patterson Moore* was in fee the tract he exchanged to *Sayre* for the land in controversy; that he made the exchange and paid 200 dollars for the difference; that he had worked for his father for two years after he became of age, at the time of this exchange; that the land he sold to *Sayre* was worth 400 dollars; that *John Moore* was at that time somewhat embarrassed, but not beyond his ability to pay.



This was all the defendants' evidence.

Upon this evidence, the Circuit Court decreed that the land in controversy was held in trust by the defendants, and that it was liable to the claim of the complainant, fixing the amount; and ordered it to be sold in default of payment of the sum due. The decree does not, in terms, declare the conveyances to *Patterson* and *Archibald Moore* fraudulent; but we presume the Court below proceeded upon that ground, as no trust was pretended to have arisen in any other form.

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We are not able to see upon what principle this decree can be sustained. Fraud is usually proved by circumstances, but the facts relied on to establish it must be of such a character as, at least, to raise a strong presumption of a corrupt intent in the vendee. Of the controverted facts, very few, if any, are proved. The bill alleges that *John Moore* was insolvent at the time *Sayre* purchased the land, in *July*, 1844, at the sheriff's sale, and that the demand on which *Briggs* obtained his judgment in 1845, was then a subsisting debt. Of the latter fact no evidence was given. *Stevenson* testifies that in 1844 or 1845, *John Moore* was understood to be insolvent, and *Line* testifies that in 1847 he was in doubtful circumstances, and much involved. This was all the plaintiff's proof on that point, to attack a conveyance made in *August*, 1844. The return of *nulla bona*, which the answer denied, was not given in evidence. In opposition to this, the defendants proved, by *Bish*, that *John Moore* was in possession of personal property worth, at least, 200 dollars; that besides the land in dispute, valued at from 600 to 800 dollars, he had an interest in another tract worth 175 dollars. That was subject to the lien of the judgment, and no reason is shown why it was not taken in execution. *Harlan* testifies that *John Moore* was somewhat embarrassed, but not beyond his ability to pay.

The bill alleges that *Sayre* conveyed the land to *Patterson Moore*, at his father's request, who paid the consideration. There is no proof that *John Moore* knew even of *Patterson Moore's* purchase. *Sayre* and *Harlan* testify that it was paid for in land, and 200 dollars in money; and *Harlan* testifies that this land belonged to *Patterson Moore* in fee, and that it was worth 400 dollars. The only circumstance of a suspicious character is, that *Sayre* received from *Patterson Moore* a portion of the same money he had paid to the sheriff, and *Patterson Moore's* admission that he received part of the money he so paid from his father. It is proved, however, that he had worked for his father two years after he became of age; and although that fact would not raise an *assumpsit* in his favor against

his father, it is a circumstance proper to be considered in determining the *bona fides* of the transaction.

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It is insisted that the conduct of *John Moore*, in permitting his land to be sold for so small a sum, and allowing his son to purchase it from *Sayre*, is evidence of fraud. The proof is that he requested *Sayre* to buy the land, promising to redeem it within ten days, which he failed to do. *Sayre* saw him afterwards, and he again promised, saying he thought he could get the money. Nothing further occurred until a month or six weeks after *Sayre's* purchase, when he sold the property to *Patterson Moore*, who paid him for it without any intervention of *John Moore*, so far as is shown by the testimony. It is not shown that *John Moore* received the rents and profits, or any other benefit from the land after that time.

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It is further shown that *Patterson Moore* paid 15 dollars on being threatened with a suit in reference to the land. We think it not difficult to vindicate the wisdom of that measure, supposing his title in no danger of a successful attack. The sum paid would have gone but a small way towards defending a chancery suit.

The most that can be said of the facts in this case is, that they raise some suspicion of unfairness. They seem to us to come very far short of that degree of certainty which is necessary to establish fraud.

As the title of *Patterson Moore* is not successfully attacked, there is no occasion to examine the validity of his conveyance to the other defendant.

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the bill.

A. J. Harlan and *C. H. Test*, for the appellants.

J. Brownlee, for the appellee.

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1855.

RUSSELL v. DRUMMOND.

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v.
DRUMMOND.

A replication to a plea setting up a written instrument as the foundation of a defence, was not required by the R. S. 1843 to be sworn to ; but if not sworn to, the execution of the instrument was not required to be proved.

If oyer of an unsealed instrument, when demanded, be given without objection, it becomes part of the record.

In a suit upon a note, oyer was given of the note and also of certain indorsements of payments upon it. *Held*, that the defendant, in pleading payment, had a right to make the indorsements a part of his plea, and that the plaintiff could not have them struck out on motion.

It is the peculiar province of the Court or jury trying a cause, to weigh the testimony and to decide upon its force, and their finding upon the mere weight of testimony will not be disturbed, except in a very clear case.

An attorney at law to whom a note is sent for collection, has no authority, merely as an attorney, to transfer the property in it to a third person.

The payment of a note by a third person, at the request of the maker, does not vest in the former any interest in the note, but raises merely an assumpsit against the maker for money paid to his use.

Wednesday,
May 30.

ERROR to the *Delaware* Circuit Court.

GOOKINS, J.—This was an action of debt, brought in the name of *Drummond*, for the use of *Russey* and *Jack*, against *Russell*, to recover the contents of a sealed note, dated in *September*, 1842, for 224 dollars and 75 cents. The suit was commenced in *August*, 1849. The issue upon which the case turned was joined on a plea of payment. There was a trial by the Court, a finding for the plaintiff for the amount of the note and interest, deducting a credit of 75 dollars. Motion for a new trial overruled, and judgment.

During the making up of the issues, as the record states, the defendant below craved oyer of the writing obligatory mentioned in the declaration, and of the indorsements thereon, which he obtained, and set them out in his plea of payment. The "indorsements," as they are called, were credits entered on the back of the note, made by one *Levi L. Hunter*, an attorney at law, at various times from *January*, 1843, to *January*, 1844, equal in all to the amount of the note and interest. To this plea of payment the plaintiff filed the usual replication in denial. The defendant thereupon moved to set aside the replication, because it was not sworn to, which motion was overruled, and he

excepted. This ruling of the Circuit Court is now assigned for error; and it is insisted that as the replication in effect denied the execution of the instruments of writing which were the foundation of the defence, it should, if not sworn to, have been rejected.

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The statute upon which the plaintiff in error relies, provides, that when an instrument which is the foundation of an action or defence is set forth in the pleadings, the pleading in denial, if not sworn to, shall not require proof of its execution. R. S. 1843, p. 711, sec. 216. Admitting that these credits were instruments of writing which were the foundation of the defence, within the meaning of the statute, the defendant below was not injured by the decision. It merely relieved him of the trouble of proving their execution, and furnished no ground for setting aside the replication.

The plaintiff below having, on leave, withdrawn his replication, moved to strike out so much of the plea as set out the credits, which motion was sustained, and that part of the plea was stricken out. Oyer can properly be demanded only of instruments under seal; but if oyer of an unsealed writing be given without objection when demanded, it becomes a part of the record. *Chapman v. Harper*, 7 Blackf. 333. Oyer having been given as well of the note, as of the indorsements upon it, the defendant had a right to make them a part of his plea, and the Circuit Court erred in ordering them to be stricken out.

On the trial the following facts appeared in evidence. *Levi L. Hunter*, an attorney at law, received from the plaintiff, who resided in *Illinois*, the note in question, for collection. Soon after he received it, he informed *James Russell, jr.*, the defendant's son, that he had the note, and stated that if he would pay it he would not distress his father. The son promised to see the note paid, and subsequently made the payments shown by the credits indorsed on the note, which payments he testified he made at his father's request. This witness was introduced by the plaintiff, and testified, among other things, that *Hunter* told him if he paid the note it would be good in his hands against the

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defendant, his father. After payment of the note, he received it from *Hunter*, and placed it in the hands of one *Anthony*, as a collateral security, and having discharged the liability for which it was pledged, the note was returned to him; and he afterwards delivered it to *Jack*, one of the persons for whose use this suit is brought, as collateral security to *Jack* for having indorsed for him in bank. About the time he received it from *Anthony*, the defendant paid him 75 dollars on the note. He testifies further, that he never had any communication with the plaintiff on the subject of the note.

Hunter testified that he received the note for collection as an attorney at law; that he entered the credits upon it as they appeared, at the time the payments were made; that he never had any authority from the plaintiff to make any disposition of the note, other than to collect the money due upon it. It appears also that on the final payment being made, *January* 19, 1844, *Hunter* entered satisfaction of a mortgage in the recorder's office of *Delaware* county, which the plaintiff held as a security for the payment of the note.

It further appeared in evidence, that the defendant frequently acknowledged this debt as a just claim against him, after its payment by his son, and while the note was in the hands of *Anthony* and *Jack*.

We are disinclined to disturb the finding of a Court or jury, upon the mere weight of evidence. It is their peculiar province to weigh testimony and to decide upon its force; and it is only in very clear cases that we should feel justified in doing so; but such we are compelled to regard this case. That *Hunter*, as an attorney at law, invested with no authority over this note, except to receive payment of it, had no power to transfer the property in it to any other person, is a proposition too clear, we think, to admit of argument. The cases of *Miller v. Edmonston*, 8 Blackf. 291, *Corning v. Strong*, 1 Ind. R. 329, and numerous others which might be cited, settle this point very clearly. It does not appear from the evidence, all of which is embodied in the record, that the payee of the note ever

authorized, or even up to the time of the trial, had any knowledge of the supposed transfer. He resided in another state, and *James Russell, jr.*, testified that he never had any communication with him on the subject. He testifies, it is true, that *Hunter* was active in getting the note into the hands of *Jack*, in a form to make it available to him, and that his father, the defendant, considered and acknowledged it as a just demand against him. But it is quite immaterial what view *Hunter* took of the matter, or the defendant either. The question is, had *Hunter* any power to transfer it? And further, it is to be observed, that the witnesses on both sides testify to the credits entered on the note as "payments." The only relation which the payment, by *James Russell, jr.*, created between him and his father, was that of an assumpsit for money paid to his use. The simple answer to this action is, the note is paid. There being no conflict of evidence upon the question of payment, and no pretence of any authority in *Hunter* to transfer the note, the finding of the Circuit Court upon the evidence can not be sustained.

Per Curiam.—The judgment is reversed, and the costs of this Court are taxed against the said *Russey* and *Jack*. Cause remanded, with instructions to the Circuit Court to dismiss the suit.

W. March, for the plaintiff.

T. J. Sample and *D. Kilgore*, for the defendant.

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PORT
V.
WILLIAMS.

PORT v. WILLIAMS.

A motion to strike out does not perform the office of a demurrer, either under the old or new practice.

Where the matter contained in a paragraph of an answer is insufficient as a defence to the action, yet if it is pertinent to the case and does not appear to be a sham defence, it can not be struck out on motion.

6	219
139	124
6	219
143	509
6	219
146	670
6	219
e164	222
f164	223
164	224
6	219
168	532

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The vendee of land can not maintain an action against the vendor for a misrepresentation of the quantity of cleared ground on the premises, where he has himself had opportunity to judge, and ample means within his reach to form a correct estimate, and appears to have relied on his own judgment.

APPEAL from the *Fayette* Circuit Court.

STUART, J.—Action on the case commenced in *March*, 1853, by *Williams* against *Port* for an alleged misrepresentation in the sale of lands. Verdict and judgment for 1,800 dollars. The evidence is all in the record in proper form.

It appears that *Port* advertised his farm for sale in one of the *Cincinnati* papers, representing it to contain seven hundred and twenty acres, of which four hundred acres were improved and in a high state of cultivation. Attracted by this notice, *Williams*, prior to his purchase, repaired to *Port's* in person and examined the premises.

The alleged false representation made before the sale, but not embraced in the terms of the contract, was, that there were four hundred acres cleared; whereas it is averred that not more than three hundred and ten acres were cleared.

For this alleged deficiency in the quantity of cleared land, this action was brought.

A preliminary question might arise, whether the parties could go behind the writing—whether that would not be presumed to contain the whole mind of the contracting parties. 8 Blackf. 237.—*Id.* 277.—*Id.* 295.—2 Ind. 477.—*Id.* 656.—7 Blackf. 432. On the other hand, in ascertaining the facts as connected with the execution of any written instrument, parol evidence is admissible. *The Mechanics' Bank v. The Bank of Columbia*, 5 Wheat. 326. But as its determination, even adversely to *Williams*, would not go to the merits of the case, but only serve to drive him into Court to reform the written contract, the material questions presented in the record may as well be met at once.

The first point raised is on striking out part of the answer. The paragraph which, on motion of the plaintiff, was stricken out, was, in substance, that before the con-

tract, &c., *Williams* and *Port* went over the land with a view to estimate the quantity under cultivation; that *Port's* estimate was four hundred acres—*Williams's* less than three hundred; that thus the quantity of cleared land was unsettled—a mere matter of opinion with both.

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The motion to strike out was sustained. This was erroneous. In any phase of the case, it was material to *Port* to be able to show that there was no warranty as to the quantity of cleared land; that it was a mere matter of opinion and discussion between the parties, with equal means of knowledge; and that their views were not concurrent. If *Williams* wished to test the sufficiency of this plea, he should have demurred. A motion to strike out does not perform the office of a demurrer, either under the old or new practice. Whether it was a sufficient defence to bar the action was wholly immaterial. It was, at least, such pertinent matter as the Court ought not to strike out on motion. It was not so irrelevant as to warrant that; it was not a sham defence. 2 R. S., 44. We are therefore of opinion that the Court erred in sustaining the motion to strike out.

The second question arises on the alleged misrepresentation as to the quantity of cleared land. The contract is silent on that point.

Had *Williams*, relying on the advertisement in the *Cincinnati* paper, purchased without seeing the land, the case would have come within the rule in *Van Epps v. Harrison*, 5 Hill 63. But the purchaser did not, in that case, make personal inspection. He trusted to the written representations of the vendee as to its condition, and consummated the contract without seeing the premises. Instead of being level and fit for building lots, as represented, it turned out to be broken and hilly. The Court held that for the misrepresentation, under these circumstances, an action would lie.

But this is a very different case. *Williams* did not trust to the *Cincinnati* advertisement. That seemed to have no other effect than to call his attention to *Port's* farm. He accordingly repaired to the premises in person, inspected

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them several times, and actually made an estimate of the quantity of cleared land before the contract was completed. In view of this evidence, it can not be said that *Williams* placed a known trust and confidence in *Port*, and acted on *Port's* opinion, within the ruling in *Shaeffer v. Sleade*, 7 Blackf. 178, or *Van Epps v. Harrison*, 5 Hill, *supra*. For his controversy with *Port* about the quantity seems to have put him upon inquiry. He accordingly set about the investigation, inspected the land for himself, and made his own figures.

In this instance, therefore, the vendee was dealing on equal terms with the vendor, about a matter the truth of which was equally open to both. As farmers, accustomed to make rough surveys with the eye, sufficiently accurate for ordinary purposes, both exercised their judgment, and came to different conclusions. Thus put upon inquiry, instead of taking a written warranty from *Port*, or calling in a surveyor to settle their difference, *Williams* either trusted to his own powers of observation, or, what is more likely, treated the point in dispute as unimportant. Hence the silence of the contract.

We are therefore of opinion that *Williams*, having thus trusted to his own judgment on a matter about which he had ample opportunity to judge, and ample means within his reach to come to a correct conclusion, was not deceived by *Port's* advertisement or *Port's* representations; and has, therefore, no right of action.

In these views we are fully sustained by the authorities. *Sanborn v. Stetson*, 2 Story R. 481.—*Hugh v. Richardson*, 3 *id.* 659. In this latter case, it is held, that when a purchaser, with full means of knowledge within his reach, relies on his own judgment, even a Court of Equity will not grant relief.

This case is very clearly distinguishable from those referred to in argument. The cases cited relate chiefly to the identity of the tract of land sold—not to its quality or external condition. Thus if the vendor undertake to identify the land, he is bound to a correct description of it. It is impliedly warranted that he is selling the identical tract

of land he has described. *Couger v. Gordon*, 4 Blackf. 110.—*Id.* 231. So, also, as to a privilege represented to be annexed to the land, which in fact is not. *Monell v. Colden*, 13 Johns. R. 395. These cases, no doubt, lay down the law correctly; but it is clearly not the law applicable to the facts before us.

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It is not necessary to examine into the proper criterion of damages in cases of misrepresentation. *Williams*, not being entitled to recover, that question does not arise in the record.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Rariden, for the appellant.

J. A. Fay and *N. Trusler*, for the appellee.

LAUGHLIN and Others v. THE PRESIDENT AND TRUSTEES
OF LAMASCO CITY.

6	223
139	681
6	223
145	84

Bill by the authorities of *Lamasco* to enjoin the defendants from constructing a wharf, at or near said place, for the reasons, 1. That they were constructing their wharf in violation of an agreement; and, 2. That the wharf, when constructed, would be a nuisance. On the first point the bill alleged that the plaintiffs adopted the same plan of wharf as that of the defendants adjoining, and that the plan was made known to the defendants, or to their agents residing at *Evansville*, and seemed to be so far satisfactory that they promised to conform thereto in any wharf which they might ultimately build adjoining it. The bill also alleged that the plaintiffs were the owners of the territory on which their wharf was to be erected.

Held, that the allegations were sufficiently certain.

Held, also, that the title of the plaintiffs was sufficiently alleged.

A bill for an injunction, under the R. S. 1843, was not required to be sworn to.

A wharf is not, *per se*, a public nuisance, which the Courts will enjoin.

An injunction will not be allowed where the injury can be compensated by damages.

In cases of conflicting evidence, where the injury to the public is doubtful, if not imaginary, an injunction will not be allowed; nor will it be allowed when the alleged nuisance is merely eventual or contingent.

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Wednesday,
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APPEAL from an order of injunction granted by the associate judges of the *Vanderburgh* Circuit Court in vacation.

STUART, J.—The appellees filed their bill to enjoin the appellants from constructing a wharf on the *Ohio* river, at or near *Lamasco*. A temporary injunction was granted by the associate judges of *Vanderburgh* county in vacation. The *Laughlins* appeal.

The grounds upon which the authorities of *Lamasco* seek an injunction are these:

1. Because the appellants were constructing their wharf in violation of an agreement.
2. Because the wharf, when constructed, would be a nuisance.

On the first point, the bill alleges that the appellees adopted the same plan of wharf as that of the appellants adjoining; that said plan was made known to the *Laughlins*, or to their agents residing at *Evansville*, and seemed to be so far satisfactory that they promised to conform thereto in any wharf which they might ultimately build adjoining it.

It is objected that this allegation is too uncertain. That would, perhaps, be the first impression. But upon looking at it more closely, in connection with the context, and remembering that "or" may sometimes mean "and," (*Rees v. Abbott*, Cowp. 832,) we are of opinion that the allegation, though informal, is substantially good. As an allegation of notice, &c., it is superseded by the subsequent clause alleging an agreement on the part of the *Laughlins*. In what manner the agreement was made, is not alleged; nor was such allegation necessary. Whether it was in writing or supported by a consideration, are questions which can arise only on the evidence, &c. Taking the whole paragraph together, we think the agreement is alleged with sufficient certainty to entitle the plaintiffs to address evidence to that point.

Some objection is made to the vagueness of the allegation of title. It is, in general, necessary to aver title; and when the plaintiff's right appears doubtful, the Court

always refuses to interfere. Eden on Injunctions, 380. May Term, 1855. It is alleged here that the complainants are the owners of the territory on which their wharf is to be erected. This is informal, and perhaps in a case where the title was the principal issue, it might be adjudged, on demurrer, insufficient. But for the purposes sought to be attained by this bill, we are of opinion that the right of the complainants is sufficiently alleged.

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It is further objected that the bill is not sworn to. Under our former practice acts of 1831 and 1838, a bill for an injunction was required to be verified. R. S. 1831, pp. 395-6. This is also the *English* practice. Eden, 274. But in the revised statutes of 1843, which are the law of this case, the provision requiring the bill to be verified in such cases, is omitted. R. S. 1843, pp. 851, 852, 853. Whether the omission occurred from oversight or design, the Courts can not supply it. Under that statute, the bill without oath is not objectionable.

The particulars in which it is alleged that the *Laughlin* wharf differs from the *Lamasco* wharf, and consequently from the kind of wharf agreed to be built, are, that the projection into the river is fifteen feet further, and the grade at an average of from four to five feet higher, than the *Lamasco* wharf. It is therefore insisted that the consequences, when it is erected, will be, to create a nuisance by the formation of bars, &c., to the permanent and irreparable injury of the *Lamasco* wharf.

On the hearing before the associate judges, both parties filed affidavits.

Accompanying the bill and affidavits, is a plat of the ground, embracing the *Lamasco* wharf, *Laughlin's* wharf, *Ross'*, and other wharfs adjoining.

The city authorities file the affidavits of *Woodward*, *Bradford* and *Walker*. It appears that the *Lamasco* and *Laughlin* wharfs were both platted and surveyed by *Woodward* and *Bradford*, who are professional engineers. From the plat, it is shown that the *Laughlin* wharf differs from the *Lamasco* wharf in two particulars. 1. It is higher.

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2. The toe of the wharf is extended fifteen feet further into the river beyond low-water mark.

The injuries, in their opinion, resulting from this want of uniformity in the wharfs, will be—

1. The inconvenience to steamers approaching and leaving the *Lamasco* wharf.

2. The difference in elevation would, in high water, create an eddy over, and thus cause large deposits of mud on the *Lamasco* wharf, to its continual and permanent injury.

3. The danger of the formation of a mud bar in front. It further appears that the *Laughlins* adopted the plan of their wharf against the advice of the engineers, who gave as an additional reason against such adoption, that the want of uniformity would offend the eye.

The *Laughlins*, in resisting the injunction, introduce the affidavits of *Ross*, *Rowley*, *Laughlin*, jr., and *Orr*.

Ross is the contractor actually engaged in erecting both wharfs. These affidavits go to the following points:

1. That the supposed injuries to result from the want of uniformity are altogether conjectural.

2. That the work on the *Laughlin* wharf was three-fourths done, at a cost of 4,000 dollars; and that to stop the work in its imperfect state would be to expose it to serious injury, perhaps total loss.

3. That *A. and J. Laughlin* were residents of *Pittsburgh, Pennsylvania*, and had not been in *Indiana* for a long time prior to the pretended agreement set up in the bill; that *Laughlin*, jr., and *Orr* had for many years been their agents, having entire control of their business in *Vanderburgh* county; that no such agreement had ever been made with them as such agents; and that none such had ever, in their belief, been made with their principals.

4. That the work had been progressing for months under the eye of the complainants, without objection, &c.

5. The situation of the ground, and the reasons for the projection and elevation of the *Laughlin* wharf beyond and above the *Lamasco* wharf, are minutely pointed out.

The first position assumed in support of the injunction, viz., that the *Laughlins* were building their wharf in violation of an agreement, is not sustained by the affidavits. Nothing is said in the complainants' evidence about an agreement. It is only made to appear that the *Laughlins* did not pay much regard to the advice of the engineers. On the other side, the affidavits make out a case, which, considering the *alibi* of the *Laughlins*, seems quite conclusive against the position that there was any understanding or agreement in relation to the plan of construction.

So that the correctness of granting the injunction must depend solely on the second position, viz., that the *Laughlin* wharf, when erected, will be a nuisance.

This position can not, we think, be sustained.

In the first place, a wharf is not of itself necessarily such a nuisance, the erection of which the Courts will enjoin. A wharf does not import, *per se*, irreparable mischief. The injuries to flow from it do not readily appear—at least they are not those of that permanently injurious character contemplated by the authorities. 6 Paige 83.—7 Met. 398. If an injury at all, in the present instance, it is clearly such as may be so compensated by damages as to check its continuance in an injurious form. 2 Story Eq., title "Injunction."

The earlier doctrine was, that injunctions would be granted against such things as were clearly public nuisances. A trial of the facts at law was then directed, and the final decree moulded according to the verdict. But, from a review of the authorities in 2 Story Eq., it would seem that the Courts have latterly exercised this extraordinary power in a very cautious and guarded form. 2 Story Eq. 271, note 1.

Besides, in the present case, the evidence, which is all mere matter of opinion, is by no means concurrent. The engineers see nothing but disastrous results. *Ross*, the builder of these wharfs, is of opinion that these disasters are visionary—that they are entitled to little weight—that experience alone can attest what results will flow from the difference in the wharfs. In such cases of conflicting

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May Term, 1855. evidence, and the injury to the public doubtful, if not imaginary, the injunction should not be granted. Story, *supra*, title "Injunction." So when the alleged nuisance is merely eventual or contingent, Courts will not grant an injunction. 9 Paige 171. In this connection, *Kent*, chancellor, holds the following language: "In offences against the public, not touching the enjoyment of property, it ought not to be brought into a Court of Chancery, which was intended only to deal in matters of civil right resting in equity, or where the law was not sufficiently adequate. Nor ought the process of injunction to be applied but with the utmost caution. It is the strong arm of the Court, and to render its operation benign and useful, it should be exercised with great discretion, and only upon necessity." *The Attorney-General v. The Utica Insurance Company*, 2 J. C. R. 372.

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The wharf in question appears to encroach in some measure upon the public thoroughfare known as the *Ohio* river. But it does not seem very probable that it will interfere with or incommode the public. And as the wharf is not a nuisance in itself—is not likely to become so—and the alleged injuries feared as impending, being, according to the case made by the affidavits, more fanciful than real, we think it one of the cases contemplated by the authorities, in which a Court of Equity will refuse to act without an adjudication at law.

If the complainants place it on the ground of a private nuisance, they concede too much. For it is not to prevent every inconvenience or injury that the Courts will interpose by injunction. That extraordinary power will be exercised in such cases only as can not be adequately compensated, and thus their repetition or continuance prevented, by damages at law. Clearly the case made by complainants, even if better sustained by the affidavits, is not one of that class.

There is great force in the remark, that "the Courts should be slow to interpose, where the thing to be stopped, while it is highly beneficial to one party, may not possibly be prejudicial to any one. The great fitness of pausing

long before we interrupt men in the improvement of their property, is manifest." May Term,
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From the case made, as it appears in the light of these authorities, we are of opinion the injunction was improvidently granted, and should be dissolved. WHITSELL
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MILLS.

Per Curiam.—The order granting the injunction is reversed with costs. Cause remanded, &c.

C. Baker, for the appellants.

J. G. Jones and *J. E. Blythe*, for the appellees.

WHITSELL and Others v. MILLS.

The legal effect of a divorce is determined by the law in force when it was granted.

By the R. S. 1831, all divorces were a *vinculo matrimonii*, and either party, after the divorce was granted, could lawfully marry.

Dower, by the R. S. 1838, was substantially as at common law.

Where husband and wife are divorced a *vinculo*, the wife, after the husband's death, is not his widow.

The widow alone, at common law, is entitled to dower.

A husband was divorced from his wife, under the R. S. 1831, and died, while the R. S. 1838 were in force, seized in fee of land. *Held*, that the wife thus divorced was not entitled to dower.

APPEAL from the *Morgan* Circuit Court.

DAVISON, J.—*Sarah Mills*, on the 22d of *January*, 1852, filed her bill of complaint, having for its object the recovery of dower in certain tracts of land situate in *Morgan* county. It is alleged that she is the widow of one *Benjamin Mills*, deceased, who, during her coverture with him, was seized of said lands, and that the same are now owned by the appellants, who were the defendants below. The defendants answered, and filed a cross bill, to which the complainant filed her answer. The Court, upon a final hearing, decreed dower, &c.

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From the pleadings and proofs, it appeared that the complainant's marriage with *Benjamin Mills* took place in *December*, 1824; that at the *April* term, 1832, he obtained

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in chancery in the *Johnson* Circuit Court, a decree against his wife, the said *Sarah*, for a divorce, on the ground that she had abandoned him without cause, and had refused to return; and that his death occurred in the year 1840.

This divorce, it is said, defeats the present claim for dower. It was granted under a statute of 1831, which, after providing for a bill, &c., enacts that the Court, there appearing just cause, &c., shall render a decree declaring the plaintiff released from his or her husband and wife, and the other party shall be released from the marriage contract to all intents and purposes, as though the same never had been solemnized. R. S. 1831, p. 214. And by a subsequent enactment, approved *January* 30, 1833, all divorces granted prior to that date were confirmed. Acts of 1833, p. 33.

The legal effect of this divorce is, no doubt, to be construed with reference to the law in force at the time the decree granting it was rendered. That decree, it must be conceded, dissolved the marriage tie then subsisting between *Sarah Mills* and her husband. It released the parties wholly from their matrimonial obligations, completely annulled the contract of marriage, and left them in the same position in which they stood prior to its existence. In technical language, the decree was a "divorce *a vinculo matrimonii*," and either party, upon its rendition, was at liberty to enter into a new marriage contract.

Was the complainant, then, entitled to dower in the lands whereof her husband was seized during the coverture and prior to the divorce? The act concerning dower in force when *Mills* died, directs "that the widow of any decedent shall, in all cases," &c., "be endowed of one full and equal third part of the lands," &c., "the legal title to which vested in her husband," &c., "at any time during the coverture." R. S. 1838, p. 238. This is substantially the same as dower at common law. And "to the consummation of the title to such estate, three things are requisite, viz., marriage, seizin of the husband, and his death." 4 Kent's Comm., p. 35. It is true, the "husband was seized during the coverture;" but was she his widow? "One of the

essential elements of a dowable capacity is, that the claimant should be the widow of the alleged husband." All the provisions of law to be found in relation to this subject speak of the "*widow*" as the only person entitled to dower. The meaning of the term is, therefore, important. *Webster* says, she is "a woman who has *lost* her husband by death." This is the popular signification of the word, and, we think, its legal meaning. But *Sarah Mills* lost her husband by divorce, and not by death. According to the elementary books, the marriage must continue until the husband's death, and the claimant must be then his actual wife. This being essential to constitute her his widow, if she be divorced *a vinculo*, she shall not be endowed, for *ubi nullum matrimonium ibi nulla dos*. 4 Kent's Comm. 36, 54.—2 Blacks. Comm. 130. In *Reynolds v. Reynolds*, 24 Wend. 193, *Bronson*, C. J., says: "As to a divorce *a vinculo*, that always put an end to dower; for although it was not necessary that the seizin should continue during the coverture, it was necessary that the marriage should continue until the death of the husband. It is only the widow who is to be endowed. The marriage bond being severed before his death, she is not his widow."

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In the revision of 1838, it is provided that in certain cases a divorce shall not bar dower; but that provision is not applicable to the case before us. The dissolution of the marriage contract took place in 1833. At that time, her right to dower was merely inchoate, not consummate. She was not then entitled to it; nor can she ever claim it, because the decree annulled the marriage relation then existing between the parties. After it passed, she was no longer his wife, and therefore could not be his widow.

By the decree granting the divorce, the rights of the parties, under the law then in force, were fixed, and they remain unchanged. It follows she has no right of dower in his estate. The present decree must be reversed.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

D. McDonald, for the appellants.

R. L. Walpole, for the appellee.

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144	187
6	239
152	21

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There can be no usury where there is not a loan.

When a note, in its inception, is a real transaction, so that the payee or promisee may, at maturity, maintain a suit upon it, the transfer of it by indorsement or discount, though beyond the legal rate of interest, is regarded as a sale of the note and a valid transaction.

A. being engaged in the erection of a flouring-mill, and desirous to raise means to complete it, proposed to convey certain lands to the bank for four drafts owned by the bank; and the drafts were accordingly assigned to him, and the land conveyed to the bank. Among the instances where the bank is allowed by its charter to purchase and hold real estate is, where real estate is conveyed to it "in satisfaction of debts previously contracted in the course of its dealings."

Held, that the purchase from A. was not within this clause of the charter.

Held, also, that being in contravention of the charter, the purchase was void.

A contract which contravenes the provisions of a statute is a nullity.

Wednesday,
May 30.

APPEAL from the *St. Joseph* Circuit Court.

DAVISON, J.—Bill in chancery. In the Court below, *Coquillard* was the complainant and the state bank and one *Horatio Chapin*, the cashier of its branch at *South-Bend*, defendants. The material facts are these:

Coquillard, on the 30th of *September*, 1839, was a director in that branch, and also a member of its finance committee, whose duty it was to purchase bills of exchange and promissory notes. On that day, the branch, through said committee, bought four drafts of 2,500 dollars each, dated *August 22*, 1839, drawn by the *Farmers' Bank of Seneca County*, in the state of *New-York*, payable at four months at the *North American Trust and Banking Company*, in the city of *New-York*. These drafts were looked upon by the directors, *Coquillard* being one of them, as extremely doubtful, and were at maturity protested for non-payment. About the 28th of *April*, 1840, *Coquillard* was engaged in the erection of a flouring-mill, near *South-Bend*, and was desirous of raising means to complete the enterprise. He proposed selling the bank promissory notes, with a view of realizing 20,000 dollars; also to convey to her certain lands in the counties of *St. Joseph* and *Lake*, for one-half of the net proceeds of the said four drafts.

In pursuance of this proposition, the parties entered into a written agreement, which stipulated that *Coquillard* was to convey to the bank, by deed in fee, certain tracts of land (describing them,) containing 1,844 acres, and at the same time assign to her 21,000 dollars in good promissory notes, to draw seven per centum per annum from the date of the agreement, viz., the 28th of *April*, 1840, said notes to be selected by a committee of the bank, for that purpose duly authorized, from such as should be offered by *Coquillard*, who bound himself to employ the proceeds of the above property and notes to be received from the bank, in the erection of a flouring-mill near *South-Bend*, and in the purchase of wheat, and for no other purpose. The bank, on her part, agreed to pay *Coquillard* 20,000 dollars, in ten equal monthly instalments, commencing one month from the date of the agreement, if so much should be needed by him in the prosecution of said business, but not otherwise; also to pay him one-half of the net proceeds or avails of the above-mentioned four drafts, which then lay under protest for non-payment, and for the settlement of which negotiations were then going on, &c., and which drafts in all amount to 10,000 dollars. And it was further understood between the parties, that reference for a fuller understanding of the contract might be had to a record of the same spread on the minute-book of said branch bank.

Upon the execution of this agreement, *Coquillard* assigned in blank and delivered to the bank 21,000 dollars in good promissory notes, which drew interest at seven per centum per annum from that date; and in the next *May* he executed and delivered deeds, according to said contract, for the lands therein described. These lands were shown to be worth 7,000 dollars. It was proved that the bank paid *Coquillard* 20,000 dollars, in monthly instalments as above stipulated, which sum, the bill alleges, was a loan from her to him. It is also alleged that the contract upon which he realized the 20,000 dollars was usurious and void, and that the bank represented the four drafts to be

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proper and legal, when, in truth, they were fraudulently made, uncurrent and valueless.

These allegations are directly denied by the answers. They deny that *Coquillard* applied for a loan, or that a loan of money was in contemplation of the parties; aver that the notes assigned to the bank had a previous existence, were not made to be discounted at bank, but were offered for sale by him and purchased by her.

Further, the answers allege that when the bank bought the four drafts, and also when *Coquillard* agreed to receive one-half of their net proceeds, he knew as much about the drafts and the abilities of the parties to them, as any other member of the board of directors.

In our opinion, the weight of evidence is in support of the answers.

The Court, on final hearing, declared the contract usurious and void, the purchase of the land to be in violation of the charter of the bank, decreed in favor of the complainant the excessive interest on the 20,000 dollars, and interest on such excess, together with the value of the land, and interest thereon from the date of the contract.

This decree involves two points of inquiry: 1. Was the contract between *Coquillard* and the bank usurious? 2. Was the purchase of the real estate a violation of her charter?

Where there is no loan there can be no usury. This rule is said to be universal. There are, no doubt, "cases which necessarily import a loan; and no disguise, no affectation of sale or barter, can divest them of that character; such, for instance, as a man's selling his own note executed in blank. When these cases occur, the law puts the stigma upon them without further inquiry. The instrument having had no virtual existence until the loan or sale was negotiated, could in no wise be regarded as a transfer of property." *Nichols v. Fearson*, 7 Pet. 103. But, in the present case, the notes assigned to the bank had a real existence prior to the contract between her and *Coquillard*. The agreement stipulates that they were to be, and they actually

were, selected from notes then in his hands. "Whenever the note, in its inception, is a real transaction, so that the payee or promisee may, at maturity, maintain a suit upon it, the transfer by indorsement or discount, though beyond the legal rate of interest, shall be regarded a sale of the note, and a valid transaction." 2 Johns. Ch. 60.—3 *id.* 66.—7 Peters 103.

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It is said in argument, that the contract upon which the notes were assigned was a mere device to evade the usury laws. If this was true, the case would be with the complainant, because such "device to evade" would, at once, strip the transaction of its character as a sale. But on the face of the deed there is nothing that favors that position. And the only evidence bearing on the point is found in the answer and deposition of *Chapin*. These prove that, at the time of the contract, *Coquillard* was considered in good circumstances, unembarrassed, and could then have obtained money by loan on the usual terms, had he applied for it. He was the owner of 1,844 acres of land, and worth more than 21,000 dollars in good paper. Hence, it would seem, that had he desired a loan, he might readily have found an indorser. Moreover, the evidence is to the point that a loan was not contemplated, but that the notes were sold by *Coquillard* and purchased by the bank.

The appellee contends that a *bona fide* sale of the notes was not intended, because the agreement stipulates that the proceeds of the property transferred should be employed in the erection of a flouring-mill and the purchase of wheat, and for no other purpose. The force of this reasoning is not perceivable. The stipulation, it is true, is unusual; such a provision is not often found in contracts; but it conflicts with no principle of law, and, in our opinion, goes just as far towards proving a sale as a loan. There is nothing in the record from which it can be inferred that the parties intended a loan of money; and there being no loan, there could be no usury in the transaction.

We are next to inquire whether the bank, in the purchase of the land, violated its charter?

Section 6 of an act establishing said bank, provides that

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the real estate which it shall be lawful for the bank to purchase, hold and convey, shall be, 1. Such as shall be required for its accommodation in the transaction of its business. 2. Such as shall be mortgaged to it, by way of security for stock, loans previously contracted, or moneys due. 3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. 4. Such as shall be purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts. And it is further provided that the "bank shall not *purchase, hold or convey* real estate, in any other case or for any other purpose." R. S. 1838, p. 94.

The land, in this case, it is said, was received by the bank in discharge of one-half of the four drafts described in the contract; that these drafts constituted "a debt previously contracted," and due to the bank; and that the land was, therefore, received strictly within the third clause of the above section. The plain answer to all this is, that *Coquillard* was no party to these drafts; the debt arising upon them was not the result of any dealings between him and her; nor was he, in any event, bound for their payment. The third clause evidently relates to conveyances from the debtor himself to the bank, in satisfaction of his own indebtedness. The construction contended for by the appellant, would allow the bank to purchase real estate *ad libitum*, provided she always paid for it in drafts received in the course of her dealings. This was not the intent of those who made the law. Indeed, it is manifest that the purchase in question was not only unauthorized, but directly in contravention of a prohibitory statute.

It is, however, insisted that though the contract of purchase may conflict with the above section, still, *inter partes*, it was valid, and that its only effect can be to lay the foundation for a *scire facias* by the state against the bank. "An important distinction has been made between contracts entered into by corporations, when the power to make them was entirely wanting, and contracts authorized by their charters, but which might involve an abuse or misuser of such authority." *Sherry v. Den*, 8 Blackf. 555.

We think this distinction is well sustained by authority. And the position insisted on would be correct, if the contract respecting the land is not within the prohibitory clause of the section. But the purchase is within that clause. The charter distinctly points out the cases wherein, and the purposes for which, the bank may buy real estate. It will, however, be at once seen that the present contract does not evince a *case* or a *purpose* within either the letter or spirit of the enactment. It was nothing more than an ordinary contract of sale, with an agreement to pay for the land by delivering to the vendor one-half of the proceeds of certain drafts when collected. The law has deprived the bank of any capacity to make such contract of purchase, and the deeds made pursuant to it must be considered absolutely void, on the principle that all contracts which contravene the provisions of a statute, are nullities. *The State, for the use, &c. v. The State Bank*, 5 Ind. R. 353.

The decree must be reversed.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. L. Jernegan, for the appellants.

J. A. Liston and J. W. Gordon, for the appellee.

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v.
THE PRESIDENT,
&c., OF
ROCKPORT.

SNYDER v. THE PRESIDENT AND TRUSTEES OF THE TOWN
OF ROCKPORT.

The act of 1852 for the incorporation of towns, confers upon the corporate authorities plenary power in relation to the grading and improvement of streets, and is constitutional.

Where a street is graded in a careful manner, pursuant to legal authority, the owners of lots contiguous thereto, have no right to compensation for consequential damages to such lots, unless such damages are expressly given by statute, and, when thus given, compensation must be sought in the manner prescribed by the statute.

The act of 1852 for the incorporation of towns, does not empower the corporate authorities to construct wharves.

6	237
145	574
6	237
154	608
155	244
6	237
162	404
6	237
163	608

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IDENT, &c., OF
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But the corporate authorities of a town will not be restrained from grading a street, merely because, by such grading, a wharf will accidentally result.

The corporate authorities of a town, under the act of 1852, can not apply money raised for improving a street, to the construction of a wharf, except so far as such wharf may be a mere incident to the legitimate improvement of such street.

Wednesday,
May 30.

APPEAL from the *Spencer* Circuit Court.

PERKINS, J.—*Thomas J. Snyder* and several others, property-holders in the town of *Rockport*, *Spencer* county, *Indiana*, filed a bill praying an injunction upon the president and trustees of said town, restraining them from making a certain improvement which they had undertaken. The bill was dismissed below for want of equity.

The bill alleges, in substance, that the town of *Rockport* is situated upon the bank of the *Ohio* river, seventy-five feet above the water; that the main street of said town, ninety feet wide, extends from the river outward, descending somewhat as it extends; that the plaintiffs own the lots upon said street on the river bluff, and that the trustees of the town are about to have said main street graded, filling the end back from the river and cutting down the end upon the river, through the bluff of seventy-five feet, so as to open a communication, by said street, between the town and the river, and also furnish a landing for steamboats, &c., at its termination. The plaintiffs in the bill object to the proceeding, and pray the Court to arrest it by injunction for the following reasons:

1. That it will greatly injure their property.
2. That the corporation does not propose to pay them damages, and is utterly unable to make such payment, if it was even willing.
3. The project, if carried into effect, would be of no utility.

We extract from the bill.

"Your complainants are informed and believe that it is not the intention of the corporation to complete the entire work during the present year, but to go on with the work, from year to year, as they shall be able to collect taxes for that purpose. Your complainants further show that the

proposed grading of main street by digging through that immense bluff and building the wharf at the place contemplated, is utterly impracticable and visionary, and, in the belief of your complainants, impossible, with the limited means at the command of this feeble corporation, the whole town interested in the work containing only about seven hundred inhabitants, already taxed to the extent of their ability to pay; that the water in front of the town, and at the proposed wharf, is shoal, and, during the season of low water, the landing is dangerous for steamboats, the bottom and shore of the river being composed of rocks and interspersed with large logs, many of them large and detached; that the proposed cut through the bluff, at the highest point, which is at or near the corner of main and front streets, for the purpose proposed, will be at least forty feet in depth, and that fifteen feet will be and is a solid sand rock, or nearly solid; and that the proposed grade and cut through the bluff, will be of no conceivable benefit, unless it is excavated deep enough for a wharf. It is pretended by the corporation, and those who are interested in destroying the property of complainants, that this grading is necessary to procure earth to fill up the lowest part of main street; but your complainants allege, and the corporation well know, that a sufficient quantity of earth for that purpose can be procured in other parts of the town, upon the same bluff, equally convenient, without injury to any one's rights of property."

Such are the facts of the case. We now inquire as to the law arising upon them.

The act for the incorporation of towns, 1 R. S. 1852, p. 482, by which *Rockport* is governed, in section 22, empowers the board of trustees thereof—"Ninth. To lay out, open, grade and otherwise improve the streets, alleys, sewers, sidewalks, and crossings, and keep them in repair, and to vacate the same." And by section 46 it provides that, "Whenever two-thirds of all the resident owners, in number or in value, of real estate bounding both sides of any street not less than one square, shall petition to have such street graded, paved, or otherwise improved, or the side-

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ROCKPORT.

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DENT, &c., OF
ROCKFORD.

The bill does not pretend but that all the requirements of the statute have been complied with by the corporation in entering upon the proposed undertaking, and it is plain that the statute confers plenary power to perform it, so far as grading and improving the street is concerned, and that statute is constitutional. *The People v. The Mayor, &c., of Brooklyn*, 4 Comstock 419. We have, then, no question before us as to legality of corporate action, or the existence of corporate power touching the grading of the street, but only one as to expediency and manner of operation; but as to the wharf there is presented a question of power.

The questions of expediency and manner, as to grading streets, are certainly left in the first instance to the property-holders and the trustees, and it would only be in a case of palpable abuse, if then, that a Court would interfere. The law says, that when a certain number of property-holders, on, &c., shall petition, the trustees shall assess a tax upon, &c., to make the improvement. It is not made, it will be observed, at the expense of the town treasury, but the property-holders on the street; and it would seem that a Court should not undertake to determine for them, in opposition to their own judgments, their ability to accomplish what their convenience and public spirit might induce them to undertake, where the proceeding was fairly entered upon. We see nothing touching this point requiring judicial interference.

As to compensation for the injury which the grading of the street may work to the property of the plaintiffs, they are entitled to none on general principles of law. This is

well settled. If the trustees were proceeding in violation of law and negligently and wantonly prosecuting the work to their detriment, the case would be different; but where a street is graded pursuant to legal authority and in a careful manner, the adjoining owners of lots have no right to compensation for consequential damages to their lots, unless expressly given by statute, and, in that case, the compensation must be sought in the manner prescribed by the statute. So are almost all the authorities. We know of but one Court that has decided to the contrary, and that is the Supreme Court of *Ohio*, in *Akron v. McCombs*, 15 and 18 *Ohio Reports*, a decision which *Bronson*, C. J., in delivering the unanimous opinion of the Court of Appeals in *New-York*, in *Radcliff's Executors v. The Mayor, &c., of Brooklyn*, says "is entitled to no respect whatever," "and can not be law beyond the state of *Ohio*." 4 *Comstock* 195. This opinion, we may say, exhausts the subject and establishes the law, as above asserted, beyond cavil.

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ROCKPORT.

The construction of the wharf presents a different question. The law constituting the charter of the town of *Rockport* does not empower the corporation to construct a wharf. It can not therefore do it as a distinct, independent undertaking. Nevertheless, the corporation will not be restrained from grading main street simply because, if that street is graded, the river end of it will accidentally be a wharf. The corporation has the right to improve that street, to grade it down to the river, to dispose of the surplus earth, &c., and, if in doing all this in a manner pointed out by law, a wharf or steamboat landing results, we should suppose it perfectly legal and a peculiarly fortunate incident to the town.

But the town trustees have no right to use the money raised for improving the street for the construction of a wharf, further than the latter may be a mere incident to the legitimate improvement of the former, and so far as they are doing so, if indeed they are to any extent, should be restrained. And because the case made by the bill renders it probable that they may be so doing to some extent, the decree below is reversed.

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Per Curiam.—The decree is reversed with costs. Cause remanded for an answer, and for further proceedings in accordance with this opinion.

A. L. Robinson, for the appellant.
L. Q. DeBruler and J. Pitcher, for the appellees.

DOYLE v. KISER.

Suit by *A.* against *B.*, the proprietor of a canal-boat, to recover the value of a carpet-bag and its contents, alleged to have been lost by *A.* while in *B.*'s possession as a common carrier. The facts of the case were as follows: *A.*, on his return journey from *California*, went aboard *B.*'s packet-boat at *Fort-Wayne*, on the *Wabash* and *Erie* canal, taking with him his carpet-bag, containing certain articles of clothing, &c., and near 4,000 dollars in gold. He paid his fare, simply as a passenger, to *Lagro*, another point on the canal, and deposited his carpet-bag, with the luggage of other passengers, on the deck of the boat, which was generally used for that purpose. On arriving at *Lagro* the carpet-bag was missing, and it was afterwards found in the canal. The gold and clothing had been abstracted, and the circumstances showed that they had been stolen. There was, also, evidence tending strongly to show that they had been stolen by one of the defendant's boatmen. *A.* made no communication to any officer of the boat, during the passage, as to the contents of the carpet-bag. The boat was provided with a small safe, and there was evidence tending to show that passengers were notified to have articles of value placed in it or keep them at their own risk; but on this point the evidence was very conflicting. The boat was in the habit of carrying articles of freight, but did not book or check baggage. The affidavit of *A.* was admitted on the trial to prove the contents of the carpet-bag; and there was a verdict and judgment for the amount of the gold, as well as of the clothing, &c.

Held, that the delivery by *A.* was, as to the carpet-bag and the articles of ordinary baggage it contained, sufficient.

Held, also, that *B.* was liable for the value of the ordinary articles of baggage, but not for the gold.

Held, also, that *A.*'s affidavit, so far as it related to the ordinary articles of baggage, was properly admitted.

Common carriers of passengers are not liable for articles of value not transported to supply any wants of the traveler, as such, on his journey, and not made known to the carriers or their agents, nor paid for as freight, but put

aboard the conveyance by the passenger simply as baggage and so treated by himself on the journey.

Articles treated as baggage may consist of clothing, money for defraying traveling expenses, a few books for the amusement of reading, a watch, a lady's jewelry for dressing, &c.

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v.
KISER.

APPEAL from the *Miami* Circuit Court.

Wednesday,
May 30.

PERKINS, J.—This was a suit by *Kiser* against *Doyle*, the proprietor of a canal packet-boat, to recover the value of a carpet-bag and contents, alleged to have been lost by *Doyle* while in his possession as a common carrier. There are several counts in the declaration, in which the charge of the loss is variously stated. The general issue was filed, the cause tried by a jury, and the plaintiff, over a motion for a new trial, had judgment for 3,357 dollars and 37 cents.

The facts of the case appear in the record.

John Kiser, the plaintiff in the suit, on his return journey from *California*, went aboard the packet-boat "*Empire*," at *Fort-Wayne, Indiana*, taking with him his carpet-bag, containing articles of clothing, &c., and nearly 4,000 dollars in gold. He paid his fare, as a passenger simply, to *Lagro*, a point westward from *Fort-Wayne*, on the *Wabash* and *Erie* canal, and deposited his carpet-bag, with the luggage of other passengers, on the deck of the boat, the place generally used for such purpose. The passage from *Fort-Wayne* to *Lagro* occupied the whole of the night of the 25th of *October*, 1850, which was cloudy and dark. The carpet-bag weighed, says a witness, about twenty-five or thirty pounds, and, on arriving at *Lagro*, was missing from the boat. It was found in the following *March*, in the *Wabash* and *Erie* canal, from sixty to eighty rods above *Cheesbro's* lock, on the heel-path side of the canal, the water being then out of it. "There was a hole cut in the bag, which was froze together." The bag contained various articles of clothing, &c., and three stones as large as a man's fist, such as are found about the lock in the canal at *Huntington*, "about five miles back from where the bag was found." The identity of the bag found with that lost was admitted, and the articles it contained,

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excepting the stones, corresponded, as far as they went, with the articles alleged to have been lost, including a miniature of the plaintiff himself.

Kiser made no communication, during the passage, to any officer of the boat, touching the contents of his carpet-bag.

The boat was provided with a small safe, and there was evidence tending to show that passengers were notified to have articles of value placed in it or keep them at their own risk, though upon this point the testimony was very conflicting.

The boat was in the habit of carrying articles of freight, but did not book or check baggage.

It was proved that *Doyle*, the defendant to the suit, was the owner of the boat; and the evidence tended strongly to show that the carpet-bag was robbed of most of its gold by one of his boatmen.

The affidavit of *Kiser*, the plaintiff, was admitted on the trial below, to prove the contents of the lost carpet-bag.

We have thus sufficiently stated the facts to present the points of law to be decided.

And the question first presenting itself is—Are common carriers of passengers liable for articles of value not transported to supply any wants of the traveler, as such, on his journey, and not made known to the carriers or their agents, or paid for as freight, but put aboard of the conveyance, by the passenger, simply as luggage, and so treated by himself on his journey?

Stage-coach proprietors, packet-boat owners, railroad companies, and others, may be engaged in the transportation of passengers only, or of passengers and freight, or of freight only; and some little confusion seems to have crept into the cases arising upon these employments, from a failure to observe the distinctions growing out of the variety of pursuit. A stage-coach proprietor has received, to carry for a reward, a box, in which he was told there was "a book and tobacco," but which contained, also, £100 in money, and which, being lost, he has been held liable for the entire contents, because, there being no fraudu-

lent concealment, the carrier having asked no questions and made no conditional acceptance, he was a guarantor of the package he had undertaken to carry. But there was no passenger in the case, it must be observed, and the box was not baggage, but carried as freight, and paid for as such. See *Gibbon v. Paynton* and *Another*, 4 Burr. 2298.

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Again, in the case of *Walker et al. v. Jackson et al.*, 10 Mees. and W. 161, "the plaintiff paid 5s. for the ferriage of his phaeton and horse, which, according to the defendants' scale of charges, was the charge for 'a light four-wheeled phaeton and one horse,' and he did not communicate the fact that the carriage contained, in the box-seat, jewelry and watches to the value of several thousand pounds." Before the phaeton was landed on the opposite side of the ferry, it, and the jewelry contained, were injured. The ferryman was held liable. *Parke, B.*, says—"I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if any thing is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is."

But this language, also, we see, was used in a case where an article was carried and paid for as freight; and, we wish to add, in a case that, under any view, seems scarcely reconcilable with principles of common honesty. The case is as if *Kiser* had gone to the proprietor of the packet, told him he had an ordinary carpet-bag, which he wished to have carried for hire, paying for it specially as such, disclosing nothing as to the gold.

The above two cases, then, we discover, on examination, differ so materially in their facts from that now under consideration, that they are not authority in it. Other and different cases are quoted as in point to the one before us; *Holister v. Nowlen*, and *Cole v. Goodwin*, 19 Wend. 234, 251. These were suits by travelers for lost baggage proper, and nothing more, and the coach proprietors resisted the

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suits, on the ground that they had published notices that baggage was to be at the risk of the owner; and the validity of such notices was the main point to be decided; and it was decided against their validity, the Court holding that common carriers could not thereby absolve themselves from liability for baggage of the traveler, but must do it by a special agreement with him. The judges, however, did not stop here, but went into a general discussion of the liabilities of carriers, without distinguishing whether of freight or passengers or both, and in the course of remark said, and quoted from *Phillips v. Earle*, 8 Pick. 182, that "the owner is not bound to disclose the nature or value of the goods; but if he is inquired of by the carrier, he must answer truly;"—the doctrine, as we have seen, by the two cases first cited in this opinion, that governs where packages, bags or boxes are delivered and received as freight, and paid for as such, no questions being asked as to contents; and which doctrine, as applicable to the facts of the cases of *Hollister v. Nowlen* and *Cole v. Goodwin*, *supra*, could only mean that travelers carrying nothing except legitimate articles of baggage proper, are not bound to mention to the railroad, steamboat, or stage-coach, &c., proprietor or master the particular articles composing their baggage; as so many stockings, shirts, or other articles of personal necessity or convenience for the journey.

These cases, therefore, do not meet the one now before this Court. Yet the learned counsel for the plaintiff below, taking up such cases and *dicta*, and applying them to the present case, say, with much earnestness, here, too, was a bag or parcel delivered to a common carrier, no questions were asked, no fraud practised, it contained a large amount of money, was lost, and the carrier, as insurer, must make it good. But the want of application of the cases and *dicta*, has already been pointed out. Here no package was delivered and paid for as freight; and the suit is not for lost baggage proper, but for other property which was never delivered and paid for as freight, but which was got on board the boat under the guise of baggage, when it was not, to avoid the payment of freight, and yet with the

intent of receiving the benefit of an insurance without cost; and the question is, can the owner recover against the carrier for that?

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Upon this question there is a class of authorities directly in point, and they establish satisfactorily the general rule that he can not. The carrier's liability upon a state of facts such as this case presents, extends only to such reasonable articles of baggage, or luggage, as it is called in *Europe*, as may be necessary for the traveler's convenience, no matter what or how valuable other articles may be which are introduced into the conveyance under the guise of baggage. The articles of property treated as baggage, according to the decisions of different Courts, may be, clothing, traveling expense-money, a few books for the amusement of reading, a watch, a lady's jewelry for dressing, &c. The law is thus settled in *England*, by statute and judicial decision, and in this country by the latter mode. *Hawkins v. Hoffman*, 6 Hill (N. Y.) Rep. 586.—*Jordan v. The Fall River Railroad Company*, 5 Cush. (Mass.) Rep. 69.—*The Mad River and Lake Erie Railroad Company v. Fulton*, 20 Ohio 318.—*The Great Northern Railroad Company v. Shepherd*, 9 Eng. L. and E. Rep. 477, S. C.—14 Eng. L. and E. Rep. 367.

This latter case lays down the law thus:

"If a passenger on a railway, by a third class parliamentary train, carry merchandise packed up with his personal luggage, the railway company are not responsible for the value of the merchandise, if the luggage be lost from the train. But if the merchandise be so packed as to be obviously merchandise to the eye, and the railway company make no charge or special bargain for the carriage, they will be responsible for the loss."

Under such circumstances, the assent of the company to take the risk, may possibly be implied. And, in this case, perhaps, had *Kiser*, when he entered the boat, informed the captain that his carpet-bag contained his ordinary baggage, and a given amount of gold in addition, and had the captain, with this information, proceeded, without objection, to take charge of the bag and contents, he might have

May Term, 1855. been liable, though on this hypothesis we make no decision.

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v.
KISER.

But it is said that the evidence shows that the gold in question was purloined from the carpet-bag by a hand employed upon the boat; and that, on this ground, at all events, the defendant in the suit must be liable. It is the general doctrine that a master is liable for the torts of his servants committed while acting within the scope of their authority as such. And upon general principles of law a carrier is responsible for freight which he undertakes to carry. But these doctrines have no application here, for the gold, the present subject of controversy, never went to the possession of the proprietor of the packet-boat, and his servants had no authority from him touching it. It was never in his charge; had it been he would have been liable; but he never became liable for it as a carrier; this we have already decided; and we confess we are not able to assign a reason, satisfactory to ourselves, why he should be liable by reason of the acts of his servants in regard to property he himself was never intrusted with. If those servants, at any town where the boat might have stopped, had stolen money from the drawer of a merchant of the place, it would hardly be pretended the proprietor of the boat would have been liable; and how is the present case to be distinguished? At all events, he can not be held liable in this case, but upon proof of gross negligence on his part, if at all, and such proof was not made.

Two other points are made in the case.

It is said the carpet-bag in question never was, in fact, delivered to the custody of the carrier. We think the delivery was sufficient as to the carpet-bag and the articles of ordinary baggage it contained. The delivery was in the usual mode by which baggage was received. The boat was not in the habit of checking or noting baggage by any written memorandum.

It is insisted, also, that the affidavit of the plaintiff was not admissible to prove the contents of the lost carpet-bag; but we think the weight of authority and reason of the case are, that such affidavit is admissible to prove the contents,

in such a case as this, to the extent of the articles of ordinary baggage. That being the limit of the right to recover, should be the limit of the right to make the proof. On this point we shall not review the authorities. See them collected in a note to *The Great Northern Railway Company v. Shepherd*, 9 L. and E. Rep., *supra*; and *The Mad River &c. Company v. Fulton*, 20 Ohio, *supra*.

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As the jury, in this case, gave the plaintiff a verdict for his gold, under instructions of the Court favorable to such finding, and the Court confirmed the verdict by a judgment, it must be reversed with costs, and the cause remanded for further proceedings.

STUART, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

Z. Baird, H. P. Biddle and B. W. Peters, for the appellant.

D. D. Pratt, D. M. Cox and J. M. Connell, for the appellee.

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The acts of January 28, 1842, (Laws 1842, p. 3,) and January 19, 1846, (Laws 1846, p. 149,) gave to the *Lafayette and Indianapolis Railroad Company* the power to appropriate private property, so far as necessary for the construction of their road, and devolved upon the board of directors the duty of having the damages assessed, upon application made to them, in the manner provided in the internal improvement law of 1836.

Where a special remedy is given by statute, for the taking of private property in the construction of public works, that remedy only can be adopted.

ERROR to the *Tipppecanoe* Circuit Court.

Thursday,
May 31.

GOOKINS, J.—*Julia A. Smith*, the defendant in error, brought an action of trespass *quare clausum fregit* against

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the *Lafayette and Indianapolis Railroad Company*, for constructing their road through her land. Plea, not guilty. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

It was admitted on the trial, that all the legislative enactments passed at various times by the general assembly in regard to said road, had been accepted by the company.

At the instance of the plaintiff, the Court instructed the jury as follows: "There is no mode provided by law for the assessment of damages for land taken by the *Lafayette and Indianapolis Railroad Company*, for their railroad; and there being no mode provided by law for assessing such damages, the defendant is liable in trespass for such damages as the jury believe the plaintiff in this cause has sustained." Other instructions were given and refused, which, from the view we take of the case, it is unnecessary to examine.

The question presented by the foregoing instruction was under review in the case of *The Trustees of the Wabash and Erie Canal v. Johnson*, 2 Ind. R. 219. From the brevity of the report of that case, the point adjudicated does not very clearly appear; but this question was fully considered. The trustees of the canal, conceiving that the legislation of 1846 and 1847, by which that board was organized, had superseded the provisions of the internal improvement law of 1836, on the subject of the assessment of damages, declined to certify into the Circuit Court an appeal prayed by *Johnson* from an assessment of damages they had caused to be made, and the *mandamus* in that case was prayed to compel them to send up the appeal. This presented the question, whether the internal improvement law of 1836, so far as it related to the assessment of damages, was still in force. That question was decided in the affirmative; and it was held that the duties which were by the act of 1836 devolved upon the board of internal improvements, and, by subsequent legislation, upon other superintendents and officers, in relation to the assess-

ment of damages, were devolved upon the trustees of the canal by the act of 1846, p. 7, sec. 8.

Under the acts of *January* 28, 1842, (Laws of 1842, p. 3,) of *January* 19, 1846, (Laws of 1846, p. 149,) and *January* 15, 1849, (Local Laws of 1849, p. 366,) the *Lafayette and Indianapolis Railroad Company* became a corporation. The first section of the first-named act provides, that "all the privileges of constructing said works, and repairing the same, and the right of condemning the right of way and materials for constructing or repairing the same, to the same extent and in the same manner that the state now holds or may exercise such rights," shall devolve upon the company which may be organized under it; and the same rights, privileges, powers, and immunities are conferred upon and vested in this company, by the act of *January* 19, 1846.

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These enactments gave to the company the power to appropriate private property, so far as necessary for the construction of their road, and devolved upon the board of directors the duty of having the damages assessed, upon application made to them, in the manner provided in the internal improvement law of 1836.

In such cases, where a special remedy is given by statute, that alone must be adopted. *Kimble v. The White Water Valley Canal Co.*, 1 Ind. R. 285.—*Conwell v. The Hagerstown Canal Co.*, 2 *id.* 588. It follows, that the instruction given was erroneous, and that this action can not be maintained.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the suit.

R. C. Gregory, R. Jones and Z. Baird, for the plaintiffs.

H. W. Chase, G. S. Orth and E. H. Brackett, for the defendant.

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v.

KEIZER.

6	288
126	638
6	259
140	383

WIGGINS, Administrator, v. KEIZER and Wife.

Testimony must be objected to when offered, or the objection will be regarded as waived.

Our statute in relation to contracts not to be performed within a year, is substantially like that of 29 *Car.* 2, c. 3, s. 4, which has always been held to apply only to contracts which, by the express stipulations of the parties, were not to be performed within a year, and not to those which might or might not, upon a contingency, be performed within a year.

That statute has no reference to agreements founded upon a past consideration.

An express promise can only revive a precedent good consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.

There is no implied promise from the father of a bastard child to the mother to furnish it a support.

A promise by the father of a bastard child to pay the step-father for the child's support, past and future, if he will continue to support it, is binding.

Thursday,
May 31.

APPEAL from the *Wayne* Court of Common Pleas.

GOOKINS, J.—*Keizer* and wife filed in the *Wayne* Common Pleas a claim against the estate of *John Mullen*, deceased, of which *Wiggins* was administrator, charging the intestate with the support, clothing, maintenance and education of an illegitimate child of the intestate, born of the wife of *Keizer* before their marriage, for six years and eleven months, commencing *December* 16, 1845, and ending *November* 1, 1852. Part of the services are stated to have been rendered by the wife before her marriage with *Keizer*, which is alleged to have taken place *July* 25, 1848, and part afterwards. A special promise by the intestate is averred.

The defendant answered, 1. By a general denial. 2. That the promise, not being in writing, was void by the statute of frauds, because it was not to be performed within one year. 3. That the promise was not made until after the services were rendered, and that there was no valid consideration to support the promise. 4. The statute of limitations. 5. That *Mullen* was not the father of

the child. 6. That no order of filiation had been made against *Mullen*. The plaintiff demurred to the second, third and sixth paragraphs of the answer, and to so much of the fourth as alleged that six years had elapsed since the promise was made, and took issue upon the fifth paragraph, and upon so much of the fourth as alleged that the cause of action had accrued more than six years before the death of *Mullen*. The demurrers were sustained. The issues were tried by the Court, who found for the plaintiffs, overruled a motion for a new trial, and gave judgment, from which the defendant appeals.

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A question discussed by the appellant arises upon the fifth issue, viz., whether *Mullen* is proved to be the father of the child. The only evidence on this point is the deposition of a *Mrs. Davis*. She testifies to repeated declarations by *Mullen* that the child was his. She also testifies, that the child was born about the 16th of *September*, 1845; that *Mrs. Keizer's* first husband was a *Mr. Good*, with whom she had lived six months or a year, when he died; that about *July*, 1848, *Mrs. Good* was married to *Keizer*; that she had been the widow of *Good* about three years when she married *Keizer*; and that the child was born while she was *Good's* widow. From this testimony the appellant infers that *Good* was alive in *July*, 1845, and that a child born in *September* of that year must be presumed in law to have been his, and that the declarations of *Mullen* were inadmissible to rebut that presumption. As no objection was made to this evidence when offered, none can now be urged to its admissibility, and the only question to be considered is, how much it proves. The witness does not pretend to fix dates. She says the child's mother lived with *Good* about six months or a year, and that she had been a widow about three years, when *Keizer* married her in *July*, 1848. As the plaintiffs were bound to prove the issue, the defendant might perhaps have insisted from this evidence alone, that *Good* was alive in *July*, 1845; but when we consider the great improbability that *Mullen* would have acknowledged the parentage of a child born within two months after the husband's death, and his often-repeated

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claim of it as his own, we think the Court was authorized to find that issue for the plaintiffs. The authorities quoted by the appellant upon the admissibility of *Mullen's* declarations, would have required an examination, had the testimony been objected to when offered.

Another position assumed by the appellant is, that the promise of *Mullen* was void by the statute of frauds, because it was not to be performed within a year. The promise proved was, that he would pay for the past and future raising of the child, and it is said that a promise to raise a child necessarily implies that the agreement is not to be performed within a year. Our statute on this subject is substantially like that of 29 *Car.* 2, c. 3, s. 4, which has always been held to apply only to contracts which, by the express stipulations of the parties, were not to be performed within a year, and not to those which might or might not, upon a *contingency*, be performed within a year. *Fenton v. Emblers*, 3 Burr. 1278.—*Moore v. Fox*, 10 Johns. R. 244. There are numerous *American* cases to the same effect. As the child may have died, within a year, the promise was not within the statute. As to the services rendered before the promise was made, it is enough to say, the statute has no reference to a past consideration.

A question of more difficulty is, whether the promise of *Mullen* was based upon a sufficient consideration. The appellees insist that there is a legal obligation upon the father of an illegitimate child to support it, because its support may be enforced, by an order of filiation; and, at least, that the moral obligation upon the father is sufficient to sustain an express promise; and several cases are referred to which are supposed to sustain the latter position.

It is proved by Mrs. *Davis* that she had often heard *Mullen* declare that the child was his; that he intended to compensate the mother liberally for its support, &c.; but none of these conversations were had in her presence. In *October*, 1852, the witness was with *Mullen* at *Keizer's* house, when he told *Keizer* and his wife that he was able to pay them for keeping the child; that he would be there again immediately after the presidential election, when he

would come prepared to pay them for all the trouble and expense of raising her thus far, and that he would then advance them money to pay for her education and support in the future. It appeared from the testimony, that *Mullen* died about the day of the presidential election, and that the child was kept at *Keizer's* until his death.

In presenting this case, no point is made by the parties upon the joining of the husband and wife, in an action on this promise, nor in regard to the effect of a promise made to them jointly. We shall, therefore, notice them no further than is necessary in determining the sufficiency of the consideration; but for that purpose we must distinguish between the services rendered before and those rendered after the marriage; and as to the former, we shall regard the case as if no marriage had taken place.

Our first inquiry, then, will be, whether the promise, in regard to the services rendered before the marriage, was based upon a sufficient consideration?

The appellees rely upon the case of *Hesketh v. Gowing*, 5 Esp. 131. In that case the plaintiff, not the mother, had nursed the defendant's illegitimate child, which he had visited while there, and admitted to be his. The defendant took the child home, where it was properly cared for, but the mother, against his consent, carried it back to the plaintiff, where it was kept with the defendant's knowledge. There was no order of filiation. Lord *Ellenborough* said, there was nothing in the objection that the child was illegitimate and no order of bastardy; that the father was liable, if he adopted the child; but that he could only be charged upon his contract. That question he left to the jury, who found for the plaintiff. This decision treats the question of bastardy as out of the case, and it was as if a father had allowed a member of his family to be sent to board, upon which an implied assumpsit would lie. It was not a question of moral obligation, but the common case of an implied assumpsit.

Nichols v. Allen, 3 Carr. & Payne 36, was an action for boarding the defendant's illegitimate child. It was resolved upon the same principles as the case of *Hesketh v. Gowing*.

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Tenterden, C. J., in giving judgment, said, there was not only a moral but a legal obligation upon the defendant, and he would hold him liable unless he had refused to allow the child to be kept at his expense.

Furillo v. Crowther, 7 Dowl. & Ry. 612, was brought by the mother against the alleged father. He had never expressly acknowledged the child as his own, but after having made some payments towards its support, refused to pay anything further, unless he could be satisfied by a magistrate's order, made on her oath, that he was the person who ought to make such payments. It was held the action would not lie.

In *Cameron v. Baker*, 1 Carr. & Payne 268, the defendant had been prosecuted for seduction. The suit was compromised upon the defendant's promise to pay £20 annually for the child's support. *Best*, J., said, "the father of an illegitimate child is not bound to maintain it, unless compelled by a magistrate's order, but if he consents to pay an annual support, he must continue to do so, or give notice that he intends to pay no longer." It would seem that in that case the compromise of the action for seduction was a sufficient consideration. It was held by this Court, in *Doe v. Horn*, 1 Ind. R. 363, that past seduction was a sufficient consideration to support a deed; and so in the case of the *Marchioness of Annandale v. Harris*, 2 P. W. 432; but a deed is good without a consideration, and in *Pennsylvania*, it seems that such a consideration is sufficient to support a promise; *Shenk v. Mingle*, 13 Serg. & R. 29.—9 Watts & Serg. 69; but it may well be doubted whether, unconnected with a compromise or some other consideration, it ought to be held sufficient. In *Binnington v. Wallis*, 4 B. and Ald. 650, the parties had cohabited for twelve years, when they agreed to cease their immoral conduct, and the defendant promised to pay the plaintiff £40 a year, and afterwards, in consideration that she would give up the annuity, he promised to pay her its value; and it was held that there was no consideration for the promise.

A disposition has been sometimes shown to bend the

rule of law, to accommodate cases of extreme hardship. Thus in *Cooper v. Martin*, 4 East 76, which was an action by a step-father against his step-son, upon an express promise to pay for his maintenance during his minority, it was held, that the promise was founded on a sufficient consideration, *especially as the plaintiff was a man of small substance, and the defendant had a competent possession to receive when he came of age.* Accommodating the rules of law to particular cases, on account of their supposed hardship, would soon introduce all that uncertainty with which the law is so often charged.

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It has often been said by eminent judges, that a moral obligation was a sufficient consideration to support an express promise; and some misapprehensions have arisen from the statement of the proposition thus broadly. The manifest impracticability of extracting from the numberless moral duties which may be demonstrated by the science of ethics, a rule of law applicable to the business relations of life, shows very plainly that those duties of imperfect obligation are not such as are contemplated by the rule when properly understood. If a bankrupt, after his discharge, or a person under a disability, after the disability is removed, or a debtor whose debt is barred by the statute of limitations, expressly promises to pay his debt, the moral obligation is apparent, and the promise has a substantial basis on which to rest, that is, a consideration actually received. Of the various definitions which have been given of this kind of moral obligation, we have met with none more satisfactory than is contained in a note to *Wennall v. Adney*, 3 Bos. and Pul. 247. "An express promise can only revive a precedent good consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

The rule thus stated is clear, intelligible, and not difficult of application. It is true there have been departures

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Tested by this rule the promise made by *Mullen* was not based upon a sufficient consideration, and was therefore not binding upon him. There is no implied promise from the father of a bastard child to the mother to furnish it a support. Legally it has no father.

The promise made to *Keizer* must be viewed in a different light. He was certainly under no obligation to support the child. *Mullen* requested him to continue its support, and promised to pay for it, past and future. As *Keizer* retained it until *Mullen's* death, he must be considered as having assented to his request. This brings the case within the principle of *Hesketh v. Gowing* and *Nichols v. Allen, supra.* The appellant objects, that, as to the past services, the promise was not binding; but it was an entire contract, embracing the past and the future. The case of *Bret v. J. S. and wife*, Cro. Eliz. 755, cited in *Wennall v. Adney, supra*, note *a*, was like the present. There the first husband sent his son to board with the plaintiff for three years, at £8 per annum, and died within the year, and the wife, during her widowhood, in consideration that the son should continue the residue of the time, promised to pay the plaintiff £6 13s. and 4d. for the time past, and £8 for every year after. This promise, upon the principle already stated, regarded as based upon the consideration of love and affection, would not have been binding upon the mother, but as there was connected with it the further consideration that he should remain at the plaintiff's table, it was held sufficient.

We are, therefore, of the opinion that for the support of the child by *Keizer*, from the date of his marriage with the child's mother, he is entitled to recover. This time appears to have been about four years and four months, for which we think a reasonable allowance, from the testimony, would be 280 dollars. If the appellees shall remit

the excess of the judgment below, it will be affirmed; otherwise it will be reversed. May Term,
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Per Curiam.—The excess in the judgment of the Court of Common Pleas having been remitted by the appellees, the judgment is affirmed.

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v.
DAGGY.

W. A. Bickle, for the appellant.

O. P. Morton, for the appellees.

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141	168

An application for a specific performance is addressed to the sound discretion of the Court.

Such discretion is not the individual discretion of the judge, but that judicial discretion which conforms itself to general rules and settled principles.

Even where the contract sought to be enforced is in writing, a decree for a specific performance is not a matter of course, but rests in the sound discretion of the Court, in view of all the circumstances.

Generally, it may be stated, that Courts of equity will decree a specific performance when the contract is in writing, is certain, is fair in all its parts, is for an adequate consideration, and is capable of being performed; but not otherwise.

Bill for a specific performance of a contract for the sale of land. The facts were as follows: *A.*, in *February*, 1847, agreed verbally with *B.* to sell to him twenty-nine acres of land, for 700 dollars, to be paid for when *B.* sold his pork. There was no part payment of the purchase-money. There was no evidence of any delivery of possession by *A.* further than this. When applied to for that purpose, he declined doing so, assigning as a reason that the land was under lease, until the next *March*, &c. *B.*, in said month of *March*, took possession; whether with or without *A.*'s consent did not appear, further than that when *A.*, in the spring of 1847, was applied to for the purpose of renting the land as pasture, he replied that he had sold it to *B.*, to whom application should be made. In *October*, 1847, *A.* and wife acknowledged a deed for said land in which *B.* was named as the grantee, and which *A.* remarked to the magistrate who took the acknowledgment, was intended for *B.* The magistrate had drawn the deed some time before by *A.*'s express directions, but what afterwards became of it did not appear. The bill averred a sale by *B.* of his hogs and a tender of the purchase-money in *November*, 1847; and a continued readiness to pay thereafter; and also a tender of the money and interest in Court; also that *B.* had made valuable improvements. *A.* pleaded the statute of frauds, accompanied by

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an answer, without oath, denying the delivery of possession, the improvements, &c. The improvements made by *B.* consisted chiefly of clearing done, which were about compensated by the sale of cord-wood taken from the land. *Held*, that *B.*, under the circumstances, was not entitled to a specific performance.

Thursday,
May 31.

ERROR to the *Putnam* Circuit Court.

STUART, J.—Bill in chancery to enforce a specific performance of a parol contract for the sale of land.

Ash agreed verbally with *Daggy* to sell him twenty-nine acres of land for 700 dollars, to be paid for when the latter sold his pork.

The parol contract was made *February* 1, 1847. There was no part payment of the purchase-money. It does not appear that *Ash* ever delivered possession. When applied to for that purpose, he declined doing so, assigning as a reason that it was under lease until the middle of *March* following. *Daggy* took possession in *March*, 1847; whether with or without the consent of *Ash* does not appear, further than this, that when *Ash* was applied to in the spring of that year for the purpose of renting the land as pasture, he replied that he had sold to *Daggy*; that the application should be made to him. It further appears that in *October*, 1847, *Ash* and wife acknowledged a deed for the land in controversy, in which *Daggy* was named as the grantee, and which *Ash* remarked to the magistrate who took the acknowledgment, was intended for the complainant. The same officer had drawn the deed some time before, by the express directions of *Ash*, but what afterwards became of it does not appear.

The complainant avers the sale of his hogs and the tender of the money in *November*, 1847; and a continued readiness to pay ever since; also a tender of the money and interest in Court. He also alleges that he has made valuable improvements. *Daggy* prays a specific performance, and that the defendant answer without oath.

Ash pleaded the statute of frauds, accompanied by answer denying the delivery of possession, the improvements, &c.

On the question of possession, nothing material is dis-

closed, beyond what is above stated. The improvements seem to have been chiefly clearing, which the evidence shows to have been pretty equally balanced by the sale of cord-wood taken from the land. Its proximity to *Greencastle* and to the railroad, seem to have suddenly enhanced its value, and hence the change of mind on the part of *Ash*.

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ASH
v.
DAGGY.

On the plea of the statute of frauds interposed by the vendor, the determination of the case must depend.

It is admitted by both parties, that an application for a specific performance is addressed to the sound discretion of the Court. 2 Blackf. 273. It is not the individual discretion of the judge, but that judicial discretion which conforms itself to general rules and settled principles. 2 Story Eq. Jurisp. 46. Even when the contract sought to be enforced is in writing, a decree for a specific performance is not a matter of course, but rests in the sound discretion of the Court, in view of all the circumstances. *Seymour v. Delancey*, 6 Johns. Ch. R. 222.—*St. John v. Benedict*, *id.* 111. "Generally, it may be stated, that Courts of Equity will decree a specific performance when the contract is in *writing*, is *certain*, is fair in all its parts, is for an adequate consideration, and is capable of being performed; but not otherwise." 2 Story Eq. Jurisp. 53.

In the case at bar, the contract is not in writing; it is uncertain as to the date of the payment; and there is no substantial part performance, nothing paid. Where, as in this case, the parol agreement is admitted by the answer, yet the statute is pleaded in bar, the defence must prevail. Such are all the later authorities. 2 Story 59, and cases cited, note 1.

We are of opinion that *Daggy* was not, under the circumstances, entitled to a specific performance.

GOOKINS, J., having been concerned as counsel, was absent.

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the bill.

S. B. Gookins, for the plaintiffs.

D. McDonald and *J. Cowgill*, for the defendant.

6 300
128 400 May Term,
1855.

BOLTON v. MILLER.

BOLTON
v.
MILLER.

Suit by a father for the seduction of his daughter. The second paragraph of the answer alleged, that the daughter was not, at, &c., the plaintiff's servant, but owed and was then rendering service to the defendant, as his apprentice, by virtue of a written agreement, dated *January 31, 1845*. The agreement, which was signed by the plaintiff and defendant, but was without seal and without acknowledgment, was set out in full. It stipulated that the daughter, then nine years old, should be bound to the defendant, as his apprentice, to learn the duties of housekeeping, for nine years from the 16th of *March, 1844*. In consideration of which the defendant agreed to give the daughter a year's schooling, and at the expiration of the term, to give her certain specified articles of household furniture. The answer further alleged that said agreement had not expired at the time of the seduction, nor at the birth of the child; that at the time the child was born, the daughter was living with the defendant, as his servant, and that afterwards the contract was cancelled by the mutual consent of the parties.

Held, that the instrument was not binding as an indenture of apprenticeship, under the R. S. 1843.

Held, also, that the instrument did not give the defendant a right to control the daughter's person, nor to compel her return.

Held, also, that the agreement operated merely as a license to the daughter to appropriate her time and wages to her own use, until she was eighteen years old; and that it was competent for the father to revoke the license, and reclaim her person at pleasure, being answerable to the defendant for a breach of the agreement, if she was taken away without just cause.

Held, also, therefore, that the paragraph was insufficient on demurrer.

The relation of master and servant exists constructively between the father and his infant daughter, although she is actually in the service of another, provided the father has a right, at any time, to reclaim her services.

A demurrer was sustained to a paragraph of an answer, which set out, by way of defence, a written agreement. The agreement was admissible in evidence upon the trial of issues raised by other paragraphs. *Held*, (the contrary not appearing,) that the defendant must be presumed to have had the full benefit of the agreement.

A defendant can not allege for error the overruling of a demurrer, where his defence was not prejudiced thereby.

In an action by a father for the seduction of his daughter, a seeming insensibility of the father to his daughter's disgrace, can not be shown in mitigation of damages.

Thursday,
May 31.

APPEAL from the *Vigo* Circuit Court.

STUART, J.—*Miller* brought an action against *Bolton* for the seduction of his infant daughter. Verdict for *Miller*, assessing his damages at 1,100 dollars. *Bolton* appeals.

The declaration, filed before the revised statutes took effect, is in the old form. The subsequent proceedings are under the new practice.

On behalf of *Bolton* it is insisted that the Court below
 erred—

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 1855.

1. In sustaining the demurrer to the second paragraph
 of the answer.

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 MILLER.

2. In certain instructions given to the jury.

3. In overruling the motion for a new trial on the fourth
 reason assigned, namely, newly discovered evidence.

The other causes filed on moving for a new trial we un-
 derstand to be either substantially embraced in the above,
 or abandoned by counsel.

First, then, it is urged that the Court erred in sustaining
 the demurrer to the second paragraph of the answer.

The paragraph to which the demurrer was thus sustain-
 ed, sets up that *Mary Miller* was not, at, &c., the servant
 of the plaintiff, but owed and was then rendering service
 to the defendant, *Bolton*, as his apprentice, by virtue of a
 written agreement, dated *January 31, 1845*. The agree-
 ment, signed by *Bolton* and *Miller*, the father, but without
 seal and without acknowledgment, is set out in full. It
 stipulates that *Mary*, then nine years old, shall be bound
 to *Bolton*, as his apprentice, to learn the duties of house-
 keeping, for the term of nine years from the 16th of *March*,
 1844, thereby expressly giving to *Bolton* the right and au-
 thority over *Mary* and her services, during that period. In
 consideration of which *Bolton* agrees to give her a year's
 schooling, and at the expiration of the term to give her
 certain specified articles of household furniture. That this
 agreement had not expired at the time of *Mary's* seduc-
 tion, nor at the birth of her child; that at the time the
 child was born, *Mary* was living with *Bolton* as his ser-
 vant; and that afterwards the contract was canceled by
 mutual consent of *Miller* and *Bolton*.

There were five other paragraphs leading to issues of
 fact, on which no question for our consideration is pre-
 sented.

The alleged seduction occurred in *June, 1850*; the birth
 of the child in the spring following; at both of which
 periods, the answer assumes, she was the servant and ap-
 prentice of the defendant, and owed no service, actual or

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MILLER.

constructive, to her father. The question thus raised on demurrer is, whether the father had any right to control her services at the time of the seduction; and, as incident thereto, whether he had any right of action against *Bolton* for the loss of such service.

It is very properly conceded in argument that this indenture was not binding under the statute then in force in relation to "*masters and apprentices*." Art. 5, c. 35, R. S. 1843. It was neither sealed, acknowledged, nor recorded, as required by that act. Many important statutory provisions, beneficial to the infant, are also wanting. The rights of *Bolton*, therefore, are not those provided by the statute; nor are his remedies to be found there. In case *Mary* had abandoned his service, *Bolton* could not avail himself of the process of reclamation pointed out in the 156th section of that act, and in those that follow. In brief, he could not, under that contract, have controlled her person or compelled her return; nor could he compel the father to return her. It is, therefore, clear that, under that contract, *Bolton* had not such legal control of her person as to compel her services.

The article set up, then, being merely a simple contract between *Bolton* and *Miller*, the remedy for its breach was by suit for damages. Had *Bolton* failed to give her the schooling and household goods, as stipulated, he would have been liable on the contract. Had the father taken his daughter from *Bolton's* service, without any just cause, it would have been a violation of the contract on his part. But we do not readily see how this contract could operate against the father by way of estoppel, or prevent him from reclaiming the person and services of his daughter, at any moment. Nor do we see any substantial ground of distinction between the case at bar and the numerous cases found in the books.

In *Martin v. Payne*, 9 Johns. R. 387, the father had permitted his daughter, who was nineteen years old, to live with her uncle, at stipulated wages, for such time as she saw proper to work. The wages thus earned were expended by herself as she thought best. While living at

her uncle's she was seduced. The Court held that the father had not divested himself of his power to reclaim her services, nor of his liability to maintain her and provide for her. She was still his servant *de jure*, though not *de facto*, at the time of the injury. The action by the father was accordingly sustained.

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BOLTON
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MILLER.

Clark v. Fitch, 2 Wend. 459, was a case somewhat similar to the present. At the time of the seduction the daughter was nineteen years old; and was then actually living out at service. The child was born at the house where she was at service, and the expenses paid by a third party. From the time of the seduction till after the birth of the child, she had not been at her father's house. The father was even ignorant of the fact of seduction, and of the institution of the suit, till some time after. Yet the Court held, that notwithstanding the father had given the daughter her time, and had incurred no expense, he had a right to recall her at pleasure, and control her services; and that, having such right, the relation of master and servant continued, and the action was well brought.

In *Bartley v. Richtmyer*, 4 Comstock 38, the doctrine of actual and constructive service, as applicable to this species of action, is elaborately considered, with no very friendly feeling on the part of the Court to extending it beyond the authorities. The judge who delivers the opinion (*Bronson*, C. J.,) says, "It is but natural that an upright magistrate should feel great indignation towards a seducer, and should sympathize warmly with those who have been injured; and judges have often regretted that the right to sue was confined within such narrow limits. It seems even to have been thought a reproach to our law that somebody should not have a right of action whenever an unmarried woman was gotten with child." Yet, from a review of all the cases, the Court, on that occasion, recognize the rule to be settled, that the relation of master and servant exists constructively between the father and his infant daughter, although she is actually in the service of another, at, &c., provided the father has a right, at any time, to reclaim her services.

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1855.

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v.
MILLER.

This may be regarded as the *American* doctrine, as distinguished from the stricter rule as to service held in some of the *English* cases. It is the rule already adopted in this Court. In *Boyd v. Byrd*, the Court reviewed some of the leading cases, and adopted the rule of constructive service, in a case which may be thought quite as strong as this. There the father had given his daughter her time, while yet a minor. She accordingly left his house with his consent, about a year previous to the seduction, and without the intention of returning. She was residing with the seducer at the time, &c. This Court held the father could maintain the action. 8 Blackf. 113.

In relation to the effect of regular articles of apprenticeship, as affecting the rights of the father, we would not be understood to intimate any opinion. That question is not before us.

The simple question, therefore, in this case, is, was *Miller* entitled to his daughter's services, at the time of the seduction? We are clearly of opinion that he was. This case can not easily be distinguished from those cited. She was an infant. There was no such contract between the father and *Bolton* as would enable the latter to hold her against the father's will. Had he reclaimed her without just cause, to *Bolton's* injury, the only consequence would have been to lay him liable to an action for breach of contract.

It is urged that the father, in this case, was at no expense for her sickness—paid nothing. Neither did the father pay anything in the case of *Clark v. Fitch*; but in both cases they were liable to pay. Neither the *accoucheur* nor nurse could have sustained an action against *Bolton* for the value of their services, unless under a special contract. No implied assumpsit would have arisen in their favor, against *Bolton*, from his position as the master or employer of *Mary*. Such implied assumpsit would have arisen against the father.

As applicable to the rights of the father, in this case, the agreement, in the light of the authorities cited, can be regarded as nothing more than a license to his daughter to

appropriate her time and wages to her own use, till she was eighteen years old. That license he could recall at pleasure. We are, therefore, of opinion that the action is well brought, and the demurrer to the second paragraph correctly sustained.

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1855.

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MILLER.

As the contract was admissible in evidence under the fifth and sixth paragraphs of the answer, we must presume that the defendant had the full benefit of it. Indeed it elsewhere appears in the record that such was the fact. So that, even if the Court had erred in overruling the demurrer, the defence was not injured by it. *Streeter v. Henley*, 1 Ind. 401.

The second error assigned is, that the Court erred in their instructions to the jury, as to the legal effect of the contract set up in the second paragraph.

This is the instrument which has just been under consideration, and the view taken of its legal effect supercedes the necessity of further notice.

The third error assigned is, in overruling the motion for a new trial on the ground of newly-discovered evidence. The affidavit of *Bolton*, and of the witness, is properly presented within the rule. 4 Blackf. 309. The newly-discovered evidence consists of a casual remark of the plaintiff, that he did not care about the seduction of his daughter, provided *Bolton* was made to pay for it. The remark was certainly very imprudent and improper—indicative, perhaps, of anger and revenge, rather than indifference. Now, considering the position of the parties and the witness, it does not appear that *Bolton* had used due diligence or any diligence to avail himself of the indiscreet expressions of the injured parent. Nor does it seem to us that such a casual remark, imperfectly understood by the witness, should have any weight, even in the mitigation of damages. And that is all counsel contend for. A seeming insensibility in the father to the disgrace of his child would not place *Bolton* in any better light. From the glimpses of the case which the record affords, the injury was one of great aggravation. The newly-discovered evidence does not even tend to modify the reprehensible conduct of *Bolton*.

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1855.

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v.
COOK.

We think, therefore, the Court correctly overruled the motion for a new trial on the ground of the newly-discovered evidence.

GOOKINS, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

R. W. Thompson, for the appellant.

J. P. Usher, for the appellee.

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132 496
133 428

COON and Others v. COOK.

A suit for a specific performance operates upon the person, and may properly be instituted in any county where the defendant resides.

The Circuit and Probate Courts had concurrent jurisdiction, under the R. S. 1843, in cases of applications by guardians to sell real estate of their wards. The R. S. 1843 provided that in all suits and proceedings of which the Circuit and Probate Courts had concurrent jurisdiction, the Court which should first take cognizance thereof should retain such cognizance exclusively, while the same might be pending in such Court.

Where an application was filed in the Probate Court by a guardian to sell real estate of his ward, and a sale was made under the order of such Court, the Circuit Court could not, under the R. S. 1843, upon a tender of the full amount of the purchase-money, take jurisdiction of a suit to compel the execution of a deed in pursuance of the sale.

A guardian appointed by the Probate Court, on account of the infancy of his ward, can not, after the arrival of the ward at full age, continue, under such appointment, to act as guardian, by reason of the insanity of such ward.

Under the R. S. 1843, a person could not be regarded as insane, so as to authorize the appointment of a guardian, unless found to be so by a jury impaneled as therein provided.

A person could not legally act as guardian of an insane person, under the R. S. 1843, until the fact of insanity was established by a jury, in accordance with the statute.

The fact that though the Probate Court appointed a person as guardian on account (as was alleged in the order of appointment) of the infancy of his ward, yet that it always regarded him as guardian of an idiot, is a circumstance of no weight in determining the validity of acts done by him after the arrival of the ward at full age.

A. was appointed guardian of *B.*, by the Probate Court, on account of the infancy of *B.* After *B.* arrived at full age, she being an idiot, *A.*, without having received any other appointment, made application to the Probate Court, as guardian of *B.*, an idiot, to sell her real estate; and, having procured an order, sold the same. *Held*, that the sale was a nullity.

May Term,
1855.

COOK
v.
COOK.

APPEAL from the *Henry* Circuit Court.

Thursday,
May 31.

DAVISON, J.—Bill in chancery by the appellee against *David Hiatt*, *Henry Carroll* and *Conrad Coon*, for a specific performance.

The material facts of this case are these:

One *Nancy Coon* was the owner of a tract of land in *Hancock* county. She was an insane person, and had been so from her birth, which occurred on the 16th of *November*, 1821. The Probate Court of *Henry* county, on the 16th of *November*, 1839, appointed *Hiatt* guardian of the person and estate of *Nancy*, who, at that date, was a minor; and the record of his appointment shows that he was so appointed because of her infancy. In *March*, 1846, *Hiatt*, describing himself as guardian of *Nancy Coon*, an idiot, applied to the Court by petition, wherein he represented, *inter alia*, that it would advance the interest of his ward's estate if the Court would authorize a sale of said land. The Court, accordingly, at its *May* term, 1846, ordered the same to be sold by the petitioner at private sale, and also directed him to make report, &c. At the *November* term, 1846, he reported the sale of the land to one *McDaniel*, for 300 dollars, payable in six, twelve and eighteen months. This report was received and the sale confirmed. When *McDaniel* bought the land, he gave *Hiatt* three promissory notes for the purchase-money, and received from him a bond for a deed upon full payment of the notes. After this *McDaniel* sold the same land to *Cook*, the appellee, to whom he assigned the bond, and *Cook* thereupon lifted said notes, and in their stead executed his own for similar amounts. At the *February* term, 1847, *Hiatt* rendered an account of his guardianship, and resigned the trust; and, on motion, the Court appointed *Henry Carroll* guardian of the said *Nancy*, who, in this order of appointment, is described as an "insane woman."

May Term,
1855.

COON
v.
COOK.

Before this no inquest was had or ordered whereby she was declared insane. But at the *June* term, 1850, on petition, a jury was impanelled to inquire as to her sanity and capacity, &c., who returned a verdict that she was an idiot, &c.; and the Court having rendered an order to that effect, appointed the said *Conrad Coon* guardian of her person and estate, who was duly qualified. It appeared that while *Hiatt* acted in the capacity of guardian, *Cook* paid him 150 dollars of the purchase-money, and that subsequently he had tendered the balance of it and demanded a deed. It was also shown that *Cook*, pursuant to his purchase, went into possession of the land, and made improvements thereon of value.

The bill prays that the contract may be specifically performed, or otherwise that the defendants may be required to refund the said 150 dollars, with interest, and pay for the improvements, &c., and for general relief.

Upon a final hearing the Circuit Court decreed that *Conrad Coon*, as guardian of the said *Nancy*, should, within ninety days, make a deed to *Cook* for the premises, and in default thereof, that he be attached, &c.

For the reversal of this decree it is contended—

1. That the land in question, being in *Hancock* county, the Circuit Court of *Henry* county had no jurisdiction of the subject-matter in controversy. This objection is not tenable. We concur with the appellee's counsel, that the present, being a suit for a specific performance of a contract, operates on the person and may properly be instituted in any county where the contractor resides.

2. That proceedings for the sale of the land having been commenced in the Probate Court, and that Court having, to some extent, proceeded in the matter and taken jurisdiction, retained it exclusively. In relation to this point, it is said that the present bill for a specific performance is an original suit, and does not assume to take jurisdiction of any matter pending in the Probate Court. The code of 1843 applies to this case. It provides, that "in all suits and proceedings of which the Circuit and Probate Courts shall have concurrent jurisdiction, the Court which shall

first take cognizance thereof shall retain such cognizance exclusively while the same may be pending in such Court." And "to authorize guardians to sell and convey any real estate of their wards," is one of the cases under the statute in which said Courts have such concurrent jurisdiction. R. S. 1843, c. 39, ss. 6 and 8.

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1855.

COON
v.
COOK.

From this it seems to us that the decree can not be sustained, because it is evident that proceedings to sell and convey this land were first instituted in the Probate Court. That Court having confirmed the sale, is expressly directed to order a deed to be executed and delivered to the vendee, upon the payment of all the purchase-money. *Id.*, c. 35, s. 117. Indeed the several statutory provisions relative to the sale of real estate by guardians, contemplates each step, from the petition to the order directing a deed to be made to the purchaser, as part of the same proceeding; and such proceeding evidently continues undisposed of in the Court that first takes cognizance of it, until a deed is actually made and delivered to the purchaser. If this view be correct, it follows that the Circuit Court, in the case before it, had no power to grant relief.

3. That the order directing the sale was a nullity, because, at the time it was made, *Nancy Coon* was of full age and had no legal guardian. This objection leads us to inquire, whether a guardian appointed on account of infancy, can, after his ward arrives at full age, continue, under such appointment, to act as guardian of the same ward because he is insane. To some extent, the respective duties of guardians for minors and insane persons are similar; but the mode of ascertaining the necessity of a guardian for an insane person is quite different from that of a minor. When *Hiatt* was appointed, his ward was just eighteen years old. At that time, she does not appear to have been represented as insane. The order of the Probate Court is very explicit. It reads thus: "Ordered, that *David Hiatt* be and he is hereby appointed guardian of *Nancy Coon*, infant, and minor heir of *John Coon*, deceased." This appointment, of course, ceased to exist when her minority ceased; and that event occurred on the

May Term,
1855.

COON
v.
COOK.

16th of *November*, 1842. In point of fact, she was then insane; but that circumstance could not prevent her arrival at full age. There is no legitimate rule of construction that would extend the force of the above order of appointment beyond the last-named period, except so far as a settlement of the trust might require. It is true that *Hiatt*, in his application for the sale, describes himself as "guardian for *Nancy Coon*, an idiot;" but the proof is that no such trust was ever conferred upon him. The order directing the sale of the premises was made in *May*, 1846. The revision of 1843 was then in force, and its provisions relative to insane persons were clearly applicable. Under these provisions no one could, in point of law, be regarded insane, unless found to be so by a jury impaneled in pursuance of the statute. R. S. 1843, p. 609.

But it is said that the act of 1838, under which *Hiatt* was appointed, did not require an inquisition to establish the idiocy before the Court could appoint a guardian. The answer to this is, that the Court did not appoint him because she was insane, but on account of her infancy. Nor does it appear that her insanity was a matter of inquiry before the Court when the order of appointment was made. R. S. 1838, p. 193.

Again, it is insisted that though *Nancy* is characterized in the record as an infant, at the time of his appointment, he was ever regarded by the Court as the guardian of an idiot. We perceive no force in that position. The mere fact that the Probate Court erroneously permitted *Hiatt* to act without authority, can have no weight in the decision of this cause. Admit, as contended, that the sale was made in good faith, at a fair price, and to an innocent purchaser, still it was made in violation of law. *Nancy Coon*, at the time, was of full age. No proper tribunal had declared her unable, in point of capacity, to dispose of her own property, and no one could legally act as her guardian.

The contract of sale was, therefore, a nullity, and the decree for a specific performance must be considered erroneous.

Per Curiam.—The decree is reversed with costs. Cause May Term,
remanded, &c. 1855.

W. Grose, for the appellants.

M. L. Bundy, for the appellee.

BELL
v.
LONGWORTH.

BELL and Another v. LONGWORTH and Another.

When a person enters upon land, under color of title by deed or other written instrument, and occupies and improves it, he acquires in law actual possession to the extent of the boundaries contained in the writing, and this though the title conveyed to him by the deed is good for nothing.

To constitute color of title it is not essential that the title should appear *prima facie* to be good.

An adverse title founded upon naked possession is limited to the particular land over which the party exercises palpable and continuous acts of ownership.

But where a party is in possession of land under and in pursuance of a state of facts which of themselves show the character and extent of his entry and claim, such facts constitute color of title, and are constructive notice to the world of the character and extent of the claim.

Action by *Longworth* for forcible entry and detainer. It appeared that *A.* and *B.*, in 1817, purchased a quarter-section of land of the *United States*, at 2 dollars per acre, paying in hand a fourth of the purchase-money, and receiving a credit for the residue. In 1820 they assigned their interest in the purchase to *C.* and *D.*, partners in the mercantile business in *Cincinnati*—*D.* residing in *Cincinnati*, but *C.* elsewhere. The firm having failed in business, and being indebted to *Longworth*, of *Cincinnati*, in order to pay the debt to him, or a part of it, *D.* sold the interest of the firm in the land to *Longworth*, and to convey it, executed an instrument as follows: For value received, we hereby assign to *Nicholas Longworth*, of, &c., all our right and claim to, &c., (describing the quarter-section,) as witness our hands this 22d day of *September*, 1821. *C.* and *D.*, by the acting partner *D.* The instrument was attested by a witness. At this time the tract was unenclosed and covered with an unbroken forest. In 1822, *Longworth* appointed an agent to take charge of his purchase, and had ever afterwards continued the agency; the agent had constantly resided on or near the land; he had cut timber over the whole of it, and prevented others from cutting, warned people off of it, and employed other persons to watch trespassers and keep them off. He had paid the taxes on the tract; leased parts of it to different persons, &c.; but the whole tract was never enclosed; but it had been known even by the oldest inhabitants as the *Longworth* tract. In 1825, payment was made to the *United States* of the residue of the purchase-money, but there not having been forwarded to the land-office an assignment of the certificate given to *A.* and *B.*, the receipt and patent issued nominally to them. There was evidence

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127	334
6	273
135	334
136	334
6	273
166	334

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1855.

BELL
v.
LONGWORTH.

tending to prove that the defendants knew the land belonged to *Longworth*; that it was in charge of his agent, and parcels of it in possession of his tenants; and that, with this knowledge, in *January*, 1852, they entered upon a portion of the cultivated part, commenced fencing it, working night and day, surrounded by a force, some of it armed, sufficient to repel opposition; and by threats, &c., did repel *Longworth's* agents from their attempts to remove their fence. The defendants claimed the right to enter upon the land by virtue of deeds from some of the heirs of *C.*, executed to them in 1851.

Held, that *Longworth* went into possession under color of title.

Held, also, that his possession covered the whole tract.

Held, also, that his possession for more than twenty years had perfected his title.

Held, also, that the jury were authorized to infer from the evidence a forcible entry and detainer.

Thursday,
May 31.

APPEAL from the *Vanderburgh* Circuit Court.

PERKINS, J.—*Longworth* and *Miles* commenced an action of forcible entry and detainer against *Bell* and *Kiger*, before two justices of the peace, charging them with forcibly and unlawfully taking and detaining the possession of the south-west quarter of section twenty, in township six south, of range ten west, in the *Vincennes* land district. An appeal transferred the cause to the Circuit Court, where there was a jury trial upon the general issue, verdict for the plaintiffs, and, after the usual motions to prevent, a judgment for restitution, &c., on the verdict.

It appears that the land in question was purchased of the *United States* by *Harrison* and *Beaman*, in 1817, at the price of 2 dollars per acre, they paying down one-fourth of the purchase-money, and receiving, as then allowed by law, a credit for the remaining three-fourths; that in 1820 *Harrison* and *Beaman* assigned their interest in said purchase to *Paxon* and *Pearson*, merchants doing business in *Cincinnati, Ohio*, though *Paxon* resided elsewhere; that said *Paxon* and *Pearson* failed in business, being, at the time, indebted to *Nicholas Longworth*, of *Cincinnati*, in a sum exceeding 3,000 dollars; and that, to pay said indebtedness, or a part thereof, *Pearson*, the acting partner, residing in *Cincinnati*, sold the interest of said firm in the land in question to said *Longworth*, and, to convey it, executed to him the following instrument:

"For value received, we hereby assign to *Nicholas Longworth*, of *Cincinnati*, all our right and claim to the south-

west quarter of section twenty, township six south, range ten west, in the district of *Vincennes*, as witness our hands this 22d day of *September*, 1821. *Charles Paxon* and *Elijah Pearson*, by the acting partner, *E. Pearson*. Signed and acknowledged in the presence of *Peyton S. Symmes*, register land-office, *Cincinnati*." May Term,
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The quarter-section was, at this date, an unenclosed, unbroken forest.

It further appears that in 1822 *Longworth* appointed an agent to take charge of his purchase, and has since continued the agency uninterrupted; that the agent has resided near or upon the land, which is situate adjoining *Evansville*, in this state; that, in the language of one of the witnesses, "the whole quarter-section was included in his agency; he cut timber over it, prevented others from cutting, warned people off of it, and employed other persons to watch trespassers and keep them off." He paid the taxes upon the quarter, leased portions of it to different individuals, by whom some clearing and fencing were done; but the whole tract was never enclosed; though the oldest inhabitants of the vicinity say it had always been called and known amongst them as *Longworth's* quarter. It also appears that in 1825 payment was made to the *United States* of the purchase-money then unpaid upon the quarter; but there not being forwarded to the land-office an assignment of the certificate given to *Harrison* and *Beaman*, the original purchasers, and by them assigned to *Paxon* and *Pearson*, the receipt and patent issued nominally to the persons last named. The record shows, likewise, a conveyance by *Longworth* of the undivided half of said quarter to *Miles*. Such is the evidence of title respectively in those two persons.

As to the entry upon and detainer of the land by *Bell* and *Kiger*, there was evidence tending to prove that they knew it belonged to, or was claimed by, *Longworth*; that it was in charge of his agent, and patches of it in possession of his tenants; and that, with this knowledge, in *January*, 1852, they entered upon a portion of the cultivated part of the section, commenced fencing it, working

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night and day, surrounded by a force, some of it armed, sufficient to repel any persons that might interfere with them; and which, by threats and hostility of attitude, did repel the agents of *Longworth* from their attempts to remove the fence.

Bell and *Kiger* claimed the right to enter upon the land by virtue of deeds from some of the heirs of *Paxon*, executed to them in 1851. Such are the principal facts of the case, and upon them two material questions arise:

1. Were *Longworth* and *Miles* in possession, under a claim of title, of the land entered upon by *Bell* and *Kiger*?

2. If so, were the entry and detainer, or either of them, of the latter forcible?

Longworth and *Miles* were undoubtedly in possession of some portion of the quarter-section upon which *Bell* and *Kiger* made entry; were they of all?

In the second volume of *Smith's Leading Cases*, p. 477, two propositions are laid down as being generally accepted by the Courts, and they are borne out by the authorities, viz.:

1. "Where one enters, not under any deed or written title, but merely assuming the possession with claim of right, the ouster he effects extends no further than he occupies, cultivates, encloses, or otherwise excludes the owner from."

2. "But if one enters under color of title by deed or other written document, and occupies and improves the land, he acquires, in law, actual possession to the extent of the boundaries contained in the writing, and this, though the title conveyed to him by the deed is good for nothing."

And in *Ellicott v. Pearl*, 10 Peters R. 412, per Mr. Justice *Story*: "Nothing can be more clear, than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts which are equally evincive of such an intention of asserting such ownership and possession; such as entering upon the land and making improvements thereon,

raising a crop of corn, felling and selling the trees thereon, &c., under color of title.”

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It will be appropriate here, then, to institute the inquiry, whether *Longworth* went into possession under color of title; for if he did, his possession would extend to the whole quarter-section, under the assignment from *Paxon and Pearson*; and should we so conclude, it will be unnecessary for us to decide the other point, as to whether such acts were performed—such a possession taken as would embrace the whole tract, regarding *Longworth* as a mere intruder, though, we will remark, that such is the inclination of our opinion.

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What, then, in a question of adverse possession, constitutes color of title?

It was held in some of the earlier cases in *New-York*, and has been in cases following those elsewhere, that color of title was that which appeared *prima facie* a good, while it was in fact a defective title. But this doctrine is without reason, and is being abandoned.

When a party is in possession of land, claiming an adverse title, the question must always arise, to what extent does his claim reach, what lands does his claim of title cover? And where there is nothing but naked possession to evidence it, his title must, from necessity, be limited to the lands over which he has exercised a visible authority, known to others, as owner; to those, in short, from which he has excluded the former owner and others. A man can not go, solitary and alone, to the prairies or forests of the west, set himself down in the middle thereof, and claim that he possesses all, to an undefined extent, not then actually possessed by some one else. He must be limited to that portion over which he exercises palpable and continuous acts of ownership, as being the quantity which he claims as his own, there being no other evidence, in such case, to enable us to determine the quantity. But where a party is in possession under and pursuant to a state of facts which, of themselves, show the character and extent of his entry and claim, the case is entirely different; and such facts, whatever they may be in a given case, perform

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sufficiently the office of color of title. They evidence the character of the entry and extent of the claim, and no colorable title does more; for such title alone does not give right; and possession under such facts as above indicated would be constructive notice, on general principles of law, to all the world, of the character of the claim of title. Hence, it has been decided that possession, under a "sale or gift of land by parol," is under color of title. *Sumner v. Stevens*, 6 Met. 337.—*Angell* on Limitations, 3 Ed., p. 503, and cases cited. To the same effect, *Fain v. Garthwright*, 5 Georgia R., cited in note on page 504, *Angell, supra*. So, under an assigned land-office certificate, transferred in this state in 1817; *Holcroft et al. v. Hunter*, 3 Blackf. 147; a case somewhat similar to the present.

Under these decisions, it is perfectly clear that *Longworth* went into possession under color of title, and that his possession extended to the whole quarter. The assignment, in this case, from *Paxon* and *Pearson*, whether valid or not, was doubtless believed to be so. It was under it that *Longworth* entered. It shows his entry to have been in good faith, on claim of right, and defines the exact extent, the exact boundaries claimed to; and his possession, under the claim, having been continuous for more than twenty years, has perfected his title to the whole quarter.

No question arises in this case as to mixed possession, that is, where different persons are in possession of different parts of the same tract, under different claims of title; and the modifications of the general doctrine of adverse possession such a state of facts occasions, need not be here noticed. See, however, on this point, the elaborate cases of *Hoye v. Swan's Lessee*, 5 Maryland R. 237, and *Armstrong v. Ristean's Lessee*, *id.* 256.

Upon the second question, we think the jury was authorized to infer from the evidence a forcible entry and detainer on the part of *Bell* and *Kiger*. See *Evill v. Conwell*, 2 Blackf. 133.

Per Curiam.—The judgment is affirmed with costs.

J. G. Jones and *J. E. Blythe*, for the appellants.

C. Baker, for the appellees.

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When the bill of exceptions states the order of events differently from the other portions of the transcript, the bill of exceptions will be taken as true.

The statute in regard to continuances in civil cases does not apply to state prosecutions.

The state, in criminal prosecutions, being represented by an officer who is not cognizant of the facts, it rarely occurs that he can make the affidavit for a continuance required in civil causes; but still some diligence must be used to prepare for a trial. The matter is left very much to the discretion of the Court, whose duty it is, on the one hand, to see that the laws are properly executed against offenders, and, on the other, that they have a trial without unnecessary delay.

ERROR to the *Tipecanoe* Court of Common Pleas.Friday,
June 1.

Gookins, J.—The defendant was arrested and examined before a justice of the peace, on the 1st day of *April*, 1853, on a charge of open and notorious adultery, of which she was found guilty by the justice, and recognized to appear in the Court of Common Pleas to answer to said charge. The justice filed a transcript of his proceedings, with the affidavit and other papers in the cause, in the Common Pleas, on the 4th day of *April*, being the first day of the term; and on the same day the district attorney filed an information against the defendant, embodying the charge contained in the affidavit. On the following day the defendant appeared and demurred to the information. The questions arising upon the demurrer were held under advisement until the eighth day of the term, when the demurrer was correctly overruled. On the following day, as the transcript states, the cause was dismissed for want of prosecution, and the defendant discharged from her recognizance.

A bill of exceptions taken by the state says, that when the cause was called for trial, the prosecuting attorney had the witnesses called on their recognizances, and duly forfeited; that on the next day the defendant appeared by her attorney and demanded a trial, when the prosecuting attorney moved the Court for a continuance, on account of the absence of the witnesses for the state, by whom, he

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stated, he expected to be able to prove the offence charged against the defendant; but the Court overruled his motion, and dismissed the cause.

The bill of exceptions states the order of events somewhat differently from the other portions of the transcript, and when this is the case, the bill of exceptions will be taken as true, and will correct the other portions of the record, for the reason that the minutes are kept by the clerk, but the bill of exceptions brings the facts distinctly to the attention of the judge who signs it.

Whether the cause was called for trial on the day the demurrer was decided or not, is still left in some doubt; but, at all events, the bill of exceptions shows that it was not dismissed on the day it was so called, but on the following day, and also that the witnesses were in default one day before the cause was dismissed.

The statute in regard to continuances in civil cases, does not apply to state prosecutions. The state is represented by an officer who is not cognizant of the facts, and it would rarely occur that he could make the affidavit for a continuance required in civil causes. Still there must be some diligence used to prepare for a trial. The matter is left very much to the discretion of the Court, whose duty it is, on the one hand, to see that the laws are properly executed against offenders, and, on the other, that they have a trial without unnecessary delay. In this case, the witnesses may have been very near at hand; they had been called the day previous, and were found to be absent. The cause was not then called for trial, but another day was given, during which no effort seems to have been made to prepare for trial, nor is any excuse shown for not making it. On taking a forfeiture of the recognizances of the witnesses, the attorney for the state might have had the cause continued, had he chosen to take that course; but as he did not do so, and another day was given, it ought to have been shown that some effort had been made to procure their attendance, either by subpoena, attachment, or otherwise, or that such efforts would have been probably unavailing.

It is not so clear to us that the Court departed from a sound discretion in the proceeding, as to justify us in reversing the judgment.

Per Curiam.—The judgment is affirmed.

L. Reilly, for the state.

W. F. Lane, for the defendant.

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LEVY v. THE STATE.

After the organization of the Courts of Common Pleas, until the R. S. 1852 took effect, proceedings for misdemeanors might be commenced simply by filing with the clerk a written charge, verified by affidavit.

The act of 1848 to prohibit the sale of spirituous liquors in a less quantity, &c., in *Wayne, Washington and Franklin* townships, in *Wayne* county, although local, is not a private statute.

To constitute a statute a public act, it is not necessary that it should extend to all parts of the state: it is a public act if it extends equally to all persons within the territorial limits described by the statute.

The Court is bound to notice a public act without pleading it. •

An affidavit against a defendant for a misdemeanor charged him by his surname, alleging his christian name to be unknown. *Held*, on motion to quash, that he was sufficiently identified.

The city of *Richmond* was incorporated by an act approved *February 24, 1840*, the 15th section of which gave the mayor, in civil and criminal cases, the jurisdiction of a justice of the peace, and the 46th section of which provided for the recovery of a penalty for the violation of any ordinance, by-law or police regulation, in an action of debt. This act was amended by an act of 1851, which declares the sale of spirituous liquors in any quantity in said city, except for the necessary uses in the arts, &c., to be unlawful; and the common council is authorized to carry out the provisions of said act, and to provide for the recovery of a penalty not exceeding, &c., for any offence. The second section gave the mayor exclusive jurisdiction of all offences committed under said act and the by-laws passed in pursuance thereof, the penalties for which were to be recovered in the manner provided in the act of incorporation. The common council passed an ordinance, pursuant to the provisions of said act, giving a penalty not exceeding, &c., for each offence, to be recovered in the manner prescribed by the charter. *Held*, that the action for the penalty for selling spirituous liquor, except, &c., under the amendatory statute, was a civil suit, and not a criminal prosecution, and, consequently, was not a bar to a prosecution by the state for the same act.

May Term, 1855. **ERROR to the *Wayne* Court of Common Pleas.**
LEVY **GOOKINS, J.**—At the *January* term, 1853, of the *Wayne*
V. Court of Common Pleas, an affidavit was filed charging
THE STATE. *Levy*, (whose first name was to the affiant unknown,) with
 having unlawfully sold to *William Crawford*, in *Wayne*
Friday, township in that county, one pint of whisky, for 5 cents,
June 1. not for mechanical or medicinal purposes.

The district attorney filed an information against *Levy*, by his full name, setting out an act passed in 1848, prohibiting the sale of spirituous liquors in *Wayne*, *Washington* and *Franklin* townships in *Wayne* county, in any less quantity than ten gallons, except for mechanical or medicinal purposes, under a penalty of not less than 3 nor more than 20 dollars. It then charged the sale by the defendant to *Crawford*, as in the affidavit.

The Court of Common Pleas overruled the defendant's motion to quash the affidavit and information, and, upon the plea of not guilty, there was a finding and judgment for the state.

It is unnecessary to notice the objections taken to the information, as there was not, at the time these proceedings were had, any statute requiring an information. The R. S. 1852^o did not take effect until after this trial; consequently, the 4th article, 2 R. S., p. 363, and ss. 19, 22 and 24, requiring informations to be filed in the Common Pleas, do not apply to the case.

The act organizing the Court of Common Pleas, however, was in force, the 15th section of which provides that criminal proceedings may be commenced by filing with the clerk a written charge, verified by affidavit. Until the statute requiring informations came in force, this was all that was necessary to put the party accused upon trial.

Two objections are taken to the affidavit. First, that it did not set out the act of 1848. The objection is not well taken. That act, which is in substance recited in the information, is published in the local laws of 1848, p. 586. Although local, it is not a private statute. To constitute a statute a public act, it is not necessary that it should extend to all parts of the state. It is a public act if it

- extends equally to all persons within the territorial limits described in the statute. *Pierce v. Kimball*, 9 Greenl. 54. May Term, 1855.
The Court was bound to notice that statute without pleading it. LEVY
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The other objection to the affidavit is, that the defendant is not charged by his full name. *Archbold* says: "If the name of the prisoner be unknown, and he refuse to disclose it, he may be described in an indictment as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison; but an indictment against him as a person to the jurors unknown, without something to ascertain whom the jury meant to designate, would be insufficient." Arch. Cr. Pl. 25. According to this authority, a person may be charged without designating him by any name, by averring his name to be unknown, and otherwise describing him. The affidavit before us charges *Levy* by his surname, alleging his christian name to be unknown. He was sufficiently identified, and the motion to quash the affidavit was properly overruled.

An objection taken to the judgment below is, that the mayor of the city of *Richmond*, within which it was proved the offence was committed, had exclusive jurisdiction of the subject, before whom the defendant had been sued by said city in an action of debt, under a by-law, and a recovery had for the same offence.

The city of *Richmond* was incorporated by an act approved *February* 24, 1840. Local Laws of 1840, p. 31. The 15th section of that act gives the mayor, in civil and criminal cases, the jurisdiction of a justice of the peace. The 46th section provides for the recovery of a penalty for the violation of any ordinance, by-law, or police regulation, in an action of debt. This act was amended by an act approved *February* 13, 1851, (Local Laws 1851, p. 340,) which declares the sale of spirituous liquors, in any quantity, in said city, except for the necessary uses in the arts and sciences, to be unlawful; and the common council is authorized to carry out the provisions of said act, and to provide for the recovery of a penalty not exceeding 50 dol-

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lars for any offence. The second section gives the mayor *exclusive* jurisdiction of all offences committed under said act and the by-laws passed in pursuance thereof, the penalties for which are to be recovered "*in the manner provided in the act of incorporation.*"

The common council passed an ordinance pursuant to the provisions of the above-mentioned act, giving a penalty not exceeding 50 dollars for each offence, to be recovered in the manner prescribed by the charter.

We are now to consider whether the amendment to the charter of the city of *Richmond* defeats the operation of the criminal law of the state upon offences of this class.

The action for the recovery of this penalty was a civil suit, and not a criminal prosecution. *The Common Council of Indianapolis v. Fairchild*, 1 Ind. R. 315. In that case, a distinction is clearly drawn between a *penalty* imposed by a city charter, and an ordinance passed under it, to be recovered in an action of debt, and a *fine* for a breach of the criminal law, as defined by the constitution of 1816. This act, which was passed under that constitution, gives a *penalty* for the offence; authorizes the council to pass ordinances to enforce it; gives the mayor exclusive jurisdiction of offences committed under that act and the by-laws passed in pursuance thereof; and provides that he shall proceed for such penalty *in the manner authorized by the act of incorporation*; that is, in an action of debt by the city against the offender. It is to be observed that this act is denominated in the title an amendment of the city charter, which justifies the inference that it was designed merely to authorize a police regulation in reference to the vending of spirituous liquors. The act does not of itself impose any penalty, but authorizes the city authorities to do it. Suppose they had chosen not to do it; is it to be inferred that all the people in that city were at liberty to vend spirits without restraint? The act, indeed, declares that it shall not be done, but that amounts to nothing without a penalty and a means of enforcing it.

By considering this exclusive jurisdiction of the mayor as applying only to offences arising under the ordinances

of the city, and recoverable in a civil action, the subject is relieved of its difficulties, and the criminal law is left to be enforced by its appropriate tribunals.

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HULL.

The proceeding before the mayor was no bar to this prosecution, and the judgment below must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

W. A. Bickle, for the plaintiff.

J. Perry, for the state.

PATE v. HULL.

The rule requiring printed briefs in the Supreme Court was adopted in *May*, 1853, and took effect at the *November* term, 1853. This cause was submitted in *May*, 1854, and the plaintiff in error filed a written brief only. *Held*, that all errors were thereby waived.

ERROR to the *Ripley* Circuit Court.

Friday,
June 1.

STUART, J.—Assumpsit by *Hull* against *Pate*, on two promissory notes of 1,000 dollars and 700 dollars respectively. The defendant appeared and filed a general demurrer to the declaration, which the Court overruled. On failure to make further defence, there was judgment on demurrer.

The cause was tried in *March*, 1853. It was submitted in this Court in *May*, 1854. On the part of *Pate*, who prosecutes error, there is a written brief filed in contravention of the rule. The rule requiring printed briefs was adopted in *May*, 1853, and took effect at the *November* term, 1853. Consequently, a written brief filed in *May*, 1854, operated as a waiver of errors.

We are thus forced to the conclusion that the object of bringing the case to this Court was delay.

This conclusion is confirmed by the errors assigned in writing, viz., 1. The service was not good, being unofficial. 2. The defendant did not appear regularly. 3. The defendant should have been called and defaulted.

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DRIVER.

The assignment of such errors, in connection with the foregoing facts disclosed in the record, that he had appeared and filed a demurrer, &c., points to but one conclusion.

The hinderance of creditors is not a legitimate object to be attained by resort to the appellate powers of this Court.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

A. Brower, for the plaintiff.

G. Holland, for the defendant.

DRIVER and Others v. DRIVER.

A decree against an infant defendant, without proof, is erroneous.

Duplicity in pleading is fatal in equity as well as at law.

Two distinct pleas in bar are not allowed in equity.

Friday,
June 1.

ERROR to the *Sullivan* Circuit Court.

STUART, J.—The defendant in error, *Jane Driver*, filed her bill in chancery to set aside a conveyance, and for relief, &c.

The bill alleges that *Jane*, while sole, and her mother, *Margaret McBroom*, in *March*, 1838, purchased forty acres of land, and paid the purchase-money; but in consequence of the minority of *Usry*, the vendor, took no deed or title-bond. *Usry*, however, delivered to them his patent for the land. That in *October*, 1839, *Jane* intermarried with *Edwin Driver*; that in *June*, 1843, *Usry* executed a deed for the land to *Margaret McBroom* and *Edwin Driver*, to which both *Margaret* and *Jane* objected, insisting that the deed should be made to them; that *Edwin*, notwithstanding, received the deed; but that it was lost and had never been recorded; that such deed had never been delivered to or accepted by *Margaret*. That in *June*, 1844, *Edwin Driver* died intestate, leaving *John*, *Martha E.* and *James Driver*, children by a former marriage, his heirs at law.

That in *February*, 1845, on the application of *John Driver*, partition of the intestate's lands among his heirs was made by order of the *Sullivan* Probate Court, wherein such proceedings were had that twenty acres of the land deeded by *Usry* was adjudged to *Martha*, and which she still holds; that *Jane*, before her marriage with *Edwin*, had made valuable improvements thereon, of the yearly value in rent of 18 dollars; that though the said *Margaret McBroom* was then living, the north half of the *Usry* land was assigned to her without making her a party to the proceedings for partition. Prayer, that the deed to *Edwin* and the proceedings in partition be set aside as fraudulent and void, and the title to the land decreed to be in complainant.

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DRIVER.

Usry, and the heirs of *Driver*, some of whom are infants, are made defendants.

The minor answers by guardian *ad litem*; the other defendants plead in bar the proceedings for a partition had in the Probate Court, setting out the substance of the petition for partition. That the ancestor died seized of certain lands, particularly describing them, and among others the twenty acres in controversy. That *Jane*, widow of the intestate, was entitled to dower therein, which had not been assigned and set off to her. That as the heirs, &c., they prayed that the widow's dower might be assigned and partition made, &c. That at the *August* term, 1845, *Jane* appeared to the petition. That she claimed dower in all the said lands; and that upon trial, &c., dower was adjudged to her and partition awarded. That commissioners were appointed, &c., and at the *November* term, 1845, the commissioners reported accordingly, setting off to *Jane* as dower in said lands a particular tract, described thus, &c. That the Court confirmed the action of the commissioners as to the dower and partition, and adjudged accordingly, which still remains of record in full force, &c. That *Jane* entered into possession of the lands so assigned her for dower, and still held and enjoyed the same up to the filing of her bill; that they, the heirs, have also taken possession of their shares respectively, under the partition, and that they plead

May Term, 1855. the proceedings in the Probate Court in bar of the relief sought in the bill, &c.

DRIVER There is a second plea, substantially the same as the
V.
DRIVER. first, only alleging that in the proceedings for dower and partition, *Jane* was the petitioner.

On motion of complainant's solicitors, the pleas were set down for argument, and adjudged by the Court insufficient and overruled. Decree in accordance with the prayer of the bill. The heirs of *Driver* bring the case up.

It is insisted in argument that the Court erred in rendering a decree against the infant defendant without evidence, and in overruling the pleas. In behalf of *Jane Driver*, the complainant, no brief is filed.

The decree against the infant, without proof, was erroneous. *Knox v. Coffey*, 2 Ind. 161.—*Hough v. Doyle*, 8 Blackf. 300.—*Hough v. Canby*, *id.* 301.—*Crain v. Parker*, 1 Ind. 374.

The question arising on the sufficiency of the pleas presents more difficulty. But as the case must go back for further proceedings, it is not necessary to look beyond the form. Duplicity in pleading is held fatal in equity as well as at law; and perhaps for far more cogent reasons. Story Eq. Pl., s. 653, *et infra*. In *Saltus v. Tobias*, it was held, that two distinct pleas in bar could not be pleaded together. 7 Johns. Ch. R. 214. The Court say: "The reasoning of Lord *Thurlow* is weighty and decisive, and since that time it has been the constant language of the Court that the plea must reduce the defence to a single point, and that a defendant can never plead double." The defendants pleaded first that *Jane* was defendant in the petition for partition; second, that she was the petitioner. This was improper. Story Eq. Pl., s. 657.

But because of the error first indicated, the decree must be reversed.

Per Curiam.—The decree is reversed with costs. Cause remanded, with leave to the defendants below to amend their pleas.

J. P. Usher and *R. H. Rousseau*, for the plaintiffs.

H. L. Livingston and *A. Cavins*, for the defendant.

GATLING v. RODMAN and Another.

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If a person owning an interest in land, and being fully apprised of his rights, stands by and allows a third person to become the purchaser, knowing that he is ignorant of such rights, and suffers him to improve the property under the belief that his title is valid, the person owning such interest (even though an infant or a married woman) is guilty of a fraud, and will be estopped afterwards from asserting such interest against the purchaser.

The phrase "standing by," in such cases, does not import actual presence, but knowledge under such circumstances as render it the duty of the possessor to communicate it.

When a married woman is the owner of real estate, the fraudulent concealment by the husband of her interest, to the prejudice of a purchaser who is ignorant thereof, can not affect the wife, unless she participated in such fraud.

APPEAL from the *Boone* Circuit Court.Friday,
June 1.

DAVISON, J.—The appellees, in right of *Emily Rodman*, formerly *Emily Blair*, but now the wife of *Israel Rodman*, sued *Gatling*, the appellant, for the undivided one-fourth of lots five and eight in the town of *Lebanon*. The complaint states that they are the owners in fee of the property in suit; alleges that it is wrongfully in *Gatling's* possession; and claims a judgment, &c.

The answer denies the ownership set up in the complaint, assumes the form of a counter-claim, and avers—

1. That *Gatling* holds the legal title to the lots, having bought them of one *James Workman*, in good faith, at full value, and received from him a deed in fee, under which, on the 18th of *February*, 1851, he obtained possession; and that *Workman*, when he conveyed, held title from one *Henry M. Spencer*, dated *April* 19th, 1850. That while in possession of the lots, he, *Workman*, made improvements thereon worth 600 dollars. That *Gatling*, since his purchase, has improved them to the value of 1,000 dollars. It is averred that *Gatling*, when he bought the lots, was wholly uninformed of the adverse claim of *Israel* and *Emily Rodman*, which want of information respecting their title was then well known to them.

2. That the appellees, with intent to defraud *Gatling*, confederated with the said *Spencer*, and concealed their

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title to the lots until he had left the state, and until *Workman* had made valuable improvements on them, and continued so to conceal their title up until the commencement of this suit, &c.

The reply is a direct denial of the answer.

There was a verdict and judgment for the plaintiffs.

It appears that one *James Blair*, in the year 1832, died seized of a sixty acre tract of land, adjoining the town of *Lebanon*, leaving four children and heirs, viz., *James G.*, *Josephus*, *Leander* and *Emily Blair*, the latter being the wife of *Rodman* and one of the appellees. In *February*, 1848, the said *James G.*, *Josephus* and *Leander* conveyed their title to that tract to the said *Spencer*, who, in that year, laid it off in lots, as an addition to said town. The lots in controversy are within that addition. *James Blair* died intestate. *Emily* was born in the year 1828; and after the death of her father she resided with her mother until the 20th of *November*, 1845, when she married *Rodman*.

There is a bill of exceptions, wherein it is shown that, in support of his answer, the defendant offered to prove by *James Richey*, a witness, 1. That the plaintiffs were residents of *Lebanon*; knew that the whole sixty acre tract had been laid off in lots, as an addition to said town; that a plat thereof had been recorded, and that persons were daily buying lots in said addition and improving them, under the belief that the title thereto was valid. That when the lots in contest were sold to the defendant, the plaintiffs were fully cognizant of their own claim of title, which title, they well knew, was wholly unknown to him or his vendor. That they *stood by* and saw the defendant making improvements on the lots, without giving him any notice whatever of their claim, when they knew he was ignorant of it. 2. That a secret understanding existed between *Spencer*, the proprietor of said addition, and *Israel Rodman*, the husband of *Emily*, to conceal all knowledge of the plaintiff's claim until the sale of all the lots embraced in the addition was completed.

An objection to the introduction of this evidence was

sustained, and the defendant thereupon reserved the question of law thus decided.

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That *Emily Rodman* derived title to the premises in dispute by descent from her father, *James Blair*, deceased, is not denied; nor is it assumed that she made any false representations respecting her right of property; but it is insisted that the proposed evidence was admissible, because its effect would have been to estop the plaintiffs from asserting their claim.

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The record does not profess to set out all the evidence in the cause. It is not, therefore, competent for us to determine whether, if the Court had ruled otherwise, the verdict should have been different. The only inquiries proper for our consideration relate exclusively to the reserved question.

The first branch of the rejected evidence should have been admitted. It was pertinent to the defence, and presented facts conducing to prove that the plaintiffs had been guilty of a fraudulent concealment of their title. If, when the defendant bought and improved the lots, *Emily*, and her husband were both fully apprised of their rights, which were unknown to him, and they, at the time, knew of such want of knowledge on his part, but stood by and suffered him to improve the property, under the belief that his title was valid, they were guilty of a fraud, and have no right to invoke the aid of a Court of justice, because the law extends no favors to a fraudulent party.

Upon this subject, Mr. *Story* thus states the law: "If a man having a title to an estate which is offered for sale, and, knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former so standing by and being silent shall be bound by the sale; and neither he nor his privies shall be at liberty to dispute the purchase." 1 *Story Eq. Jur.*, s. 185. This principle is sustained by various adjudications upon the point now under consideration. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344.—*Storrs v. Barker*, 6 id. 166.—*Hartman v. Kendall*, 4 Ind. R. 403. In the last case,

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the Court ruled "that if a party, even an infant of years of understanding, claiming a secret title to land, stand by and see it sold or see another expend money upon it, in the belief that there is no such secret title, and the party claiming knows that the money is so being expended, he may be estopped to assert such title." The phrase "standing by," used in the above authorities, does not import an actual presence, "but implies knowledge under such circumstances as render it the duty of the possessor to communicate it." *The State v. Holloway*, 8 Blackf. 45.

When these sales took place and the improvements were made, *Emily Rodman*, it is true, was a married woman; but that relation would not excuse her from the ordinary duty of disclosing her title, when good faith required that it should not remain concealed. "Cases of this sort are viewed by Courts with so much disfavor, that neither infancy nor coverture will constitute an excuse for the party guilty of such fraudulent concealment; for neither infants nor femes covert are allowed the privilege of practising deceptions on innocent persons." Sugden on Vendors, 121.—1 Story Eq. Jur., s. 385. These principles, however, do not apply where a party having the adverse claim is not apprised of his rights, or where the purchaser knows them to exist; because, in that case, there can be no concealment, nor could the title be deemed secret; but the evidence under discussion assumes the ground that the plaintiffs concealed their title, and also that the defendant, when he purchased and improved the lots, was wholly ignorant of its existence. The first point in the proposed evidence was therefore admissible.

But we have seen that the defendant, by the same witness, offered to prove "that a secret understanding existed between *Spencer* and *Rodman* to conceal all knowledge of the plaintiff's claim until the sale of all the lots in the addition was completed." As *Emily* was the real claimant, we think it was not competent for the defendant to set up in his defence any fraudulent combination against his rights to which she was not a party. The premises were her separate estate, and she is not to be estopped

from asserting her claim to them on account of a fraud committed by her husband, unless, indeed, it be further shown that she participated in his deceitful conduct. To this branch of the evidence the plaintiffs' objection was correctly sustained.

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Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

O. S. Hamilton, for the appellant.

J. E. McDonald and *S. C. Willson*, for the appellees.

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Where there are two provisions in a will which are totally inconsistent, that which is posterior in local position must be taken to denote the intention of the testator.

APPEAL from the *Harrison* Circuit Court.

Friday,
June 1.

DAVISON, J.—Bill in chancery. *Hudson*, the appellee, was the complainant, and *Evans* the defendant.

On the 28th of *November*, 1840, one *Levi Giddings* made his will, and within six days thereafter died, leaving *Martha Giddings* his widow, two children, *Julia Evans* and *Ardekia Hudson*, and three grand-children, named *James A. Hudson*, *Beersheba Hudson* and *Levi Saffer*. The appellant, who was the defendant below, is the husband of the said *Julia*. *Ardekia* was the mother of *James A.*, the appellee, and *Beersheba* his sister. *Giddings*, at his death, left a large estate, in money and property, which has been settled by his administrators. When *Giddings* died, the appellee and his sister were minors, and the appellant became their guardian.

The bill charges that the appellee and his sister were entitled as legatees under the testator's will; that as such guardian the appellant has received large amounts of money, notes and judgments from said estate, the whole

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of which of right belong to them, &c. The bill prays that the guardian may account and pay over to the appellee his portion of the money, &c., and for general relief.

By his answer the appellant admits that, as guardian, a certain amount of money came to his hands; denies that he is liable to account to the appellee and his sister for more than one-half of it; and alleges that the money, &c., in controversy was bequeathed to the said *Ardelia Hudson* and *Julia Evans*, the only children of the testator alive at his death; that *Ardelia* had died intestate, leaving the appellee and his sister her only heirs; and that it is alone as such heirs, and not as legatees under the will, that they can claim an interest in the subject of the present suit; that the will gave the money, notes, &c., mentioned in said bill equally to *Julia Evans* and *Ardelia Hudson*, and that *Julia* being the appellant's wife, he is in her right entitled to one-half of said money, &c.

The cause was submitted, &c. Upon final hearing the Court decided that all the property in contest had been by said will bequeathed to the said *Ardelia Hudson*, and accordingly decreed in favor of the appellee 583 dollars.

The will is as follows:

"As to such estate as it hath pleased God to entrust me with, I dispose of in the following manner:

"1. I direct that my debts be paid," &c.; "that all my stock, household and kitchen furniture shall remain in the hands of my wife; that after collecting all moneys and paying all just debts, the balance of my moneys shall be put out at interest, and the interest applied, so far as may be necessary, to the tuition of my two grand-children, *James A.* and *Beersheba Hudson*. *Afterwards divided between my children.*

"2. I bequeath to my grandson, *Levi Saffer*, 150 dollars in cash, to be put out at interest, and the principal and interest to be paid to him when he arrives at the age of twenty-one.

"3. I will that my wife shall have and hold a certain tract of land in the *Jeffersonville* district," (describing the land); "also certain lots in the town of *Elizabeth*," (des-

cribing them,) "for and during her life. Said property, at her death, to be equally divided amongst *my children*." May Term, 1855.

"4. To my daughter *Ardelia Hudson* I devise a certain tract of land in said district," (describing it); "also a block of lots," (describing them); "to have and to hold to her during life, and after her decease to be equally divided between my two grand-children, *James A.* and *Beersheba Hudson*."

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"5. It is also my will that it shall be the duty of my administrator or executor to deliver up to my daughter *Julia Evans*, or her husband *John A. Evans*, all notes, receipts, bonds or dues whatever which I hold against the said *Julia* and *John A.*, which shall be in full payment of the said *Julia* and *John A. Evans*' proportion of my estate, together with all accounts, dues and demands which the said *John A.* or *Julia*, his wife, may hold against me," &c.

The appellant, in right of his wife, claims under the first clause of the will. As we have seen, it provides that "after collecting," &c., "and paying," &c., "the balance of my moneys shall be put out at interest, and such interest, so far as necessary, to be applied to the tuition of my two grandchildren; afterwards to be divided between my children." Whether any amount was ever appropriated to the purposes of tuition, as directed by the will, is not shown; but it is proved that *Julia Evans* and *Ardelia Hudson* were the only children of the testator in being when the will was made, or at his death. The first clause, therefore, is decided in its support of the defence set up in the case, because there is nothing in the will tending to show that the testator meant to use the word "children" in any other than its ordinary sense. Those who bore to him that relation, and no others, were evidently intended.

But the clause thus relied on is, in our opinion, directly in conflict with a subsequent provision, which, in effect, excludes the right of *Julia Evans* from any portion of the property involved in this suit. The fifth clause, it will be seen, is very explicit. It directs the executor to deliver up to the appellant and his wife all notes, &c., which the testator held against them, "in full payment of their propor-

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tion of his estate," together with all accounts, &c., which they might hold against him. These provisions in the will are totally inconsistent with each other. They can not stand together. When this occurs, the rule of construction is well settled. "The clause which is posterior in local position must prevail, the subsequent words being considered to denote a subsequent intention." 1 Jarm. on Wills, 394.

It is said in argument that the intention of the testator, collected not from any particular or detached clause, but from the whole will, must govern its construction. Where such intent can be ascertained, that principle obviously applies; but would its application to the present case favor the defence? The claims to be surrendered plainly constituted a part of the estate. We are not informed by the record of the amount of these claims, but as they were in express terms directed to be delivered up "*in full payment,*" &c., it is not an unfair presumption that the testator considered them, in amount, at least, one-half of all the personalty bequeathed to his children, and therefore a fair provision for the appellant and his wife. At all events, no intent, either express or implied, sufficient to control the expressed import of the last clause, can be collected from the whole will; and that clause, being "posterior in local position" to the one under which the appellant claims, must be allowed to denote the real intention of the testator. This construction, it is said, will materially affect provisions in the will other than those under discussion. We think differently. But whether it will or not is a question not "arising in the record," and, for that reason, not properly before us.

It is insisted that the decree is too large; that it is for an amount not authorized by the proof. We have carefully examined the evidence, and, in our opinion, the weight of it sustains the finding of the Court.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

H. P. Thornton and *W. A. Porter*, for the appellant.

R. Crawford, for the appellee.

ROSS v. THE LAFAYETTE AND INDIANAPOLIS RAILROAD
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The Circuit Courts under the constitution of 1851 were a continuation, in a somewhat modified form, of the Circuit Courts under the constitution of 1816. Suits in them were not abated by the constitution of 1851; and the former laws regulating the practice were continued in force until changed by legislation under the latter constitution, and governed the practice of the existing Circuit Courts.

A subscription of stock to a railroad company contained a provision that the stock subscribed should be paid in cash at such times and places as should thereafter be directed by the directors of the company, and should be applied to the construction of the road.

Held, that the subscription could not become payable until the directors, at a regular meeting, had fixed the time and place of payment.

Held, also, that it was not necessary to give notice to the subscriber of the time and place of payment.

APPEAL from the *Clinton* Circuit Court.

Friday,
June 1.

PERKINS, J.—The *Lafayette and Indianapolis Railroad Company*, on the 29th of *September*, 1852, instituted suit against *Johnston Ross*, on a written instrument reading as follows:

“We, the undersigned, do hereby acknowledge ourselves indebted to the *Lafayette and Indianapolis Railroad Company*, on account of stock hereunto subscribed to said company, for the amounts by us respectively subscribed, to be paid in cash at such times and places as shall hereafter be directed by the directors of said company, and to be applied in the construction of the said railroad from *Lafayette* to *Indianapolis* in the state of *Indiana*. *Johnston Ross*, \$200.”

On the 8th of *February*, 1853, the parties appeared, and the defendant moved that the suit should be dismissed for want of jurisdiction in the Court; which motion being overruled, he pleaded the general issue, went to trial, and had judgment against him for the 200 dollars and interest.

The ground of the motion for a dismissal of the suit was, that the new constitution abolished the old Circuit Courts and abated the suits pending in them; provided no system of practice for the new Courts; and that, hence,

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from the adoption of the new constitution to the coming into force of the judiciary act under that constitution, there were no Courts having jurisdiction, &c.

The Circuit Courts under the new constitution were a continuation, in a somewhat modified form, of the Circuit Courts under the old; suits in them were not abated by the new constitution; and the former laws regulating the practice were continued in force till changed by legislation under the latter constitution, and governed the practice of the existing Circuit Courts. The motion for dismissal was rightly overruled.

The only remaining objection to the judgment below is, that suit was commenced before legal notice was given that payment was required.

It appears that the board of directors, at a regular meeting subsequent to said subscription, entered an order upon their record-book, requiring payment at the office of the company in *Lafayette*, of 20 dollars of the amount subscribed, within sixty days after the 12th of *October*, 1848, and the remainder, in specified sums, at specified times, between the expiration of said sixty days and the first day of *April*, 1852; and published a notice of the order in a newspaper of general circulation in that section of the state, which was the only notice given. This notice the defendant below disregarded, if it came to his knowledge, paid nothing on his subscription, and, in *September*, 1852, after all the instalments became due, was sued and adjudged liable to pay the subscription.

His position is that he was entitled to personal notice from the company.

This question is to be determined upon the contract of subscription sued on. There is nothing in the charter of the company controlling it.

If that contract is, in effect, but a promise to pay upon demand, the suit itself constituted that, and no other was necessary. It is well settled that a suit will lie upon a promissory note for money payable on demand, without a previous special demand of payment; and upon a declaration on such a note simply averring a general demand,

proof of a special demand is not necessary. See 1 Swan's Pr., 282. May Term, 1855.

The learned and eminent counsel for the defendant below, in his brief in this Court, admits this contract of subscription to be but a promise to pay upon demand. He says, "the undertaking to pay the instalments was like a promise to pay money on demand." Upon this admission we might let the case rest.

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But we are not satisfied with this interpretation of the contract. Here was a subscription to a corporation for the purpose of aiding the construction of a railroad, a work to be subsequently commenced, if at all, and only requiring payment of the subscription for its prosecution after it should be commenced. This commencement would be, whenever it should take place, by order of the directors. Their action in the premises would determine the time when payment of the subscription would be necessary. Hence the contract stipulates that it shall be paid "as shall hereafter be directed by the directors of said company." Now, it seems to us that this direction was to be a condition precedent to the subscription becoming payable; and it would necessarily be made by the directors at a regular meeting of the board, the proceedings of which the stockholders would naturally inquire into. It could be made in no other manner. The contract does not stipulate that notice shall be given to the subscribers, but only that the board of directors shall fix the time when the stock shall be payable. This is all the condition made, and that, we think, the board were bound to perform before suit.

There could be no very great necessity for notice; and to give it personally to the numerous and widely scattered stockholders every time a small instalment was called for, would be very expensive and troublesome, and, thus far, detrimental to the stockholders themselves, who, in the end, foot the bills; while, on the other hand, the road is the property of the stockholders; the directors are their agents, acting for them; the stockholders have a right to know and inspect their proceedings, and may well be sup-

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posed to be sufficiently interested to induce them to do so. Under such circumstances, where they agree to pay their subscription at such times as the directors shall fix, without stipulating for notice, we think suit may be maintained without it.

In this case the proof showed that the directors had fixed the times, &c., and notice not being necessary, the suit was properly sustained. The judgment below will be affirmed.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

I. Naylor, for the appellant.

R. C. Gregory and *R. Jones*, for the appellees.

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A temporary injunction ought not to be granted to restrain the defendant from removing property, the subject of commerce, out of the jurisdiction of the Court, (such as pork and lard, suitable to be sent abroad to market,) unless the plaintiff shows that he has an immediate interest in such property, and that he will be injured by the removal, and that the interference of the Court is necessary to save him from serious loss or damage.

A temporary injunction ought not to be granted in such case, without notice to the adverse party. If the complaint shows such an emergency as will justify the interference of the Court, an order should be granted to restrain the removal, for a reasonable time, until notice can be given.

Allegations that at the time of the execution of a written contract for the sale of the vendor's interest in the joint property of himself and the purchaser, the vendor was dangerously sick; that the purchaser insisted upon purchasing his interest; that being in a low and weak state he signed the contract of sale; that it was made in view of his approaching death; and that he had recovered, furnish no ground for setting aside such contract, no unconscientious advantage appearing to have been taken, and no fraud being alleged.

A parol condition made at the time of such contract, that if the vendor recovered it should be set aside, is void.

A vendor seeking to rescind a contract of sale must offer to return the consideration received.

APPEAL from the *Cass* Circuit Court.May Term,
1855.

GOOKINS, J.—*McVey*, the appellee, on the 27th day of *April*, 1855, and during the sitting of the *Cass* Circuit Court, filed his complaint against the defendants, the appellants, praying an injunction to restrain them from removing a quantity of pork, hams, &c., out of the jurisdiction of the Court, and for the appointment of a receiver. The case made by the complaint is as follows:

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That about the 15th of *November*, 1854, the plaintiff entered into partnership with the defendants in the business of packing pork at *Rochester*, in *Fulton* county. The plaintiff was to put into the concern 1,000 dollars, and was to have one-half of the profits and to bear one-half of the losses. He furnished the required amount of money, and they proceeded in the business, which produced mess pork, hams, shoulders, lard, &c., to the value of 8,441 dollars, out of which lard of the value of 200 dollars had been sold, and the residue was stored with *Pollard* and *Wilson*, of *Logansport*. About the 9th of *February*, the plaintiff was taken sick and was confined fifty-six days, was dangerously ill, and for a long time his life was despaired of. During this sickness the defendants came to his house, and insisted upon buying out his interest in the pork, lard, &c., and after continued solicitation by the defendants, the plaintiff, being in such low and weak state, signed a contract, by having his hand held to trace the letters, by which he was made to sell his interest in the partnership property for 1,080 dollars, for which they executed to him their note due one day after date. The contract was made in view of his approaching death, and it was at the same time verbally agreed that if he recovered, it was to be null and void, and he was to retain his rights as a partner. He has since recovered his health, though he remains in a somewhat weak state. At the time of the sale his interest was worth 1,500 dollars, and at the time of filing his complaint it was worth 2,000 dollars. The defendants now claim the property, excluding him from any control of it, and have directed *Pollard* and *Wilson* to ship it out of the jurisdiction of the Court, and are

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about having it so shipped to his injury. The complaint states that it is a case of emergency, and if he should give the defendants notice of his application for an injunction, it would only afford them an opportunity to do the injury it was intended to prevent.

On the plaintiff's motion a temporary injunction was awarded, to continue until the further order of the Court. A receiver was appointed to take charge of the property, and to manage it as partnership property, until further order. From this order the defendants appeal to this Court, pursuant to the statute allowing appeals from temporary injunctions.

These proceedings, we think, can not be sustained, and there are several grounds upon which they appear to us to be radically defective. The complaint itself shows no case for an injunction. It alleges, it is true, that the plaintiff, when he was induced to sell out his interest in the partnership to the defendants, was sick and weak in body, but there is no pretence that his mind was impaired, nor that any undue influence was used to induce him to make the sale. No doubt there is a weakness of mind less than insanity, which, if taken advantage of fraudulently, will be sufficient to avoid an unjust contract into which the party has been drawn. *McCormick v. Malin*, 5 Blackf. 509. But no such facts are shown here.

Again, no offer is shown to rescind the contract. Indeed, the note, which was due one day after date, is not so much as averred to be unpaid. True, it is made an exhibit, but that is not equivalent to such an averment. Neither are the defendants alleged to be insolvent, nor does it anywhere appear that the plaintiff is in danger of loss; nor is it shown that he has any interest in the property. The verbal condition annexed to the contract of sale is nugatory.

Had the plaintiff shown that he had an interest in the property, still he has not shown that any improper use was being made of it. The allegation is that it was about being sent out of the jurisdiction of the Court. In the absence of any averment that it was being sent to any

improvident or wrongful destination, we are to presume, from the usual course of business, that it was to be sent to market; just where it should have gone as well for the interest of the defendants as of the plaintiff, if he had any in the property.

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The injunction ought not to have been allowed without notice. The statute is as follows: "No injunction shall be granted until it shall appear to the Court or judge granting it, that some one or more of the opposite party concerned has had reasonable notice of the time and place of making the application; except that in cases of emergency, to be shown in the complaint, the Court may grant a restraining order until notice can be given, and hearing thereon." 2 R. S. 1852, p. 60, s. 139.

The restraining order contemplated by this section is limited in its operation, and extends only to such reasonable time as may be necessary to notify the adverse party. Temporary injunctions are usually granted in vacation, and in terms they continue in force until the further order of the Court, which is frequently several months; and such is the character of the order in this case. It is shown to have been made without notice to the opposite party.

An injunction is the strong arm of the Court, and should never be resorted to but upon necessity. *Laughlin v. Lamasco City*, ante, p. 223. It should never be allowed, in the first instance, except upon a case clearly made, showing an equitable right to the interference of the Court, and good ground to apprehend such loss or damage as can not be compensated for, and then not until the opposite party has had notice.

The granting of this injunction and appointment of a receiver, without showing an equitable right, or any danger of loss or injury, and without notice, was wholly irregular, and the order of the Circuit Court must be reversed.

Per Curiam.—The order of the Circuit Court is reversed, with costs. Cause remanded, with instructions to the Circuit Court to dismiss the suit.

D. D. Pratt and *S. C. Taber*, for the appellants.

H. P. Biddle and *B. W. Peters*, for the appellee.

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In reviewing a decision of the Circuit Court, upon the mere weight of evidence, every reasonable intendment is to be indulged in favor of the verdict, and the decision will not be reversed if it can be sustained by any fair construction of the testimony; but if, upon a careful review of the evidence, the judgment can not be reconciled with the proof, it will be reversed.

After the dissolution of a partnership the firm is not bound by the new contracts of a partner, although he was authorized to settle the business of the firm; nor has a partner a right, without the consent of his co-partner, express or implied, to appropriate the property or effects of the firm to his separate use.

A., B. and C. being partners, C. retired from the firm, and the business of the firm was wound up by A. and B. The firm, and also A. and C. individually, were indebted to D. and E., another firm, and the latter, as partners and also individually, were indebted to the firm of A., B. and C. After C.'s retirement from the last-named firm, A., in a settlement with D., in which the said several individual and partnership accounts of the parties were blended, gave a note payable to D. and E., in the name of the firm of A., B. and C., for a balance found due, upon the accounts thus blended, to D. and E. B. afterwards paid part of the note and repeatedly promised to pay the balance. *Held*, that B. thereby ratified the act of A., and that A. and B. were liable for the payment of the note.

Tuesday,
June 5.

APPEAL from the *Tippecanoe* Circuit Court.

GOOKINS, J.—*Chase*, as the assignee of *Robinson*, brought suit before a justice of the peace against *George Merkle* and *Francis G. Kendall*, on a promissory note signed *Merkle, Kendall & Co.*, dated *March 24, 1842*, for 149 dollars and 39 cents. There were two credits on the note, one of 50 dollars, and the other of 15 dollars. Process was not served upon *Merkle*. *Kendall* pleaded the general issue under oath. The plaintiff obtained a judgment before the justice, from which the defendant appealed to the Circuit Court, where there was a trial by the Court, finding for the defendant, motion for a new trial overruled, and judgment. *Chase* appeals.

From the evidence, all of which is embodied in the record, it appears that previous to *October, 1840*, *George Merkle*, *Jacob Merkle* and *Francis G. Kendall*, the appellee, had been partners in the business of merchandising at *Delphi*. About that date *George Merkle* bought out the interest of *Jacob Merkle*, who withdrew from the firm.

There is some conflict in the evidence as to whether *George Merkle* and *Kendall* continued business together after the dissolution of the firm by the withdrawal of *Jacob Merkle*; but they were embarrassed, and little, if anything, was done except to wind up the business of the partnership, which was done by *George Merkle*. *Allen* and *Robinson* were partners in the practice of law, and transacted business for the firm, and for *George* and *Jacob Merkle* individually, and for them jointly; all of which they charged to the firm. *Allen* and *Robinson* were jointly and each separately indebted to *Merkle, Kendall & Co.*, for goods, and for moneys received in the course of their business.

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On the 24th of *March*, 1842, *Allen* and *Robinson* having previously dissolved, *Robinson* and *George Merkle* had a settlement of the accounts of both firms, in which *Robinson* charged *Merkle, Kendall & Co.* with all fees and services rendered to the firm, and to *George* and *Jacob Merkle* individually, and *George Merkle* charged *Allen* and *Robinson* with the accounts of the firm against each of them separately, as well as their account against them jointly; and for the balance found due upon so adjusting the accounts, he gave *Robinson*, in his own name, the note sued on. *Robinson* testifies that *Kendall* often promised to pay the note, and paid 15 dollars on it, which is credited *August* 9, 1842, at which time he promised to pay the balance soon. *Jacob Merkle* testified that he knew nothing of the giving of the note until two years after its date, when *Robinson* called on him for payment, and he refused to recognize it. *Allen* testified that *Allen* and *Robinson* charged the firm of *Merkle, Kendall & Co.* with all services rendered to any member of the firm, but frequently designated on their books for whom the service was rendered, to enable them to arrange the matter among themselves; that of their account, amounting to 417 dollars and 50 cents, the sum of 110 dollars was for services rendered to *George Merkle*, and 40 dollars for services rendered to *George* and *Jacob Merkle*, in which *Kendall* was not interested. On the other side, *George Merkle*, acting for his firm, charged *Allen* and *Robinson* with the private

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account of *Allen*, amounting to 49 dollars and 81 cents, of *Robinson*, 10 dollars and 32 cents, and an account in favor of *Kendall* against *Allen*, assumed by *Merkle, Kendall & Co.*, of 5 dollars and 23 cents. The residue of the accounts, on both sides, were properly chargeable to the respective firms. He further stated that when *Allen* and *Robinson* dissolved, the latter took their books and collected what was due upon them, and he had not seen them since; that *George Merkle* settled the business of their firm, but that he did not attend to business much after 1840, having become dissipated, worthless and insolvent; that the dissolution of *Merkle, Kendall & Co.* was known to *Allen* and *Robinson*; that they supposed the goods they got of the firm were paid for in the way of services; that he, as the administrator of an estate, paid *Kendall* 15 dollars, which he paid to *Robinson* on the note, knowing it to be the money of the firm, the three being together; and that the keeping of the books of *Allen* and *Robinson* by the latter, was not with his consent expressly given, though he had an equal right to them.

In reviewing a decision made in the Circuit Court, upon the mere weight of evidence, every reasonable intendment in favor of the verdict is to be indulged, and we do not feel justified in reversing a decision which can be sustained upon any fair construction of the testimony; but after having carefully reviewed the evidence in this case, we are unable to see how the judgment below can be reconciled with the proof.

We do not intend to question the well-settled doctrine, that after the dissolution of a partnership the firm is not bound by the new contracts of a partner, although authorized to settle the business of the firm. *Yandes v. Lefavour*, 2 Blackf. 371.—*Hamilton v. Seaman*, 1 Ind. R. 185. Nor has one partner a right, without the consent of his co-partner, express or implied, to appropriate the property or effects of the firm to his separate use. Story on Partnership, s. 102, note.—*Id.*, s. 132. In the settlement between *George Merkle* and *Robinson*, which resulted in the giving of the note which is the foundation of this action, two

partnership transactions were attempted to be adjusted, one by *Robinson* as the partner of *Allen*, and the other by *Merkle* as a partner of the firm of *Merkle, Kendall & Co.* On the part of the latter, there can be no doubt, from the evidence, that they were bound by the transaction. *Jacob Merkle* had withdrawn from the firm, and, as he testifies, had sold his interest in the concern to *George Merkle*. The repeated promises of *Kendall* to pay the note, and the actual payment of 15 dollars upon it, the first proved by the plaintiff's witness, and the last by the witnesses of both parties, amount to a ratification of the unauthorized act of *George Merkle* by *Kendall*. The act, of course, bound *George Merkle*, and there was no attempt to enforce the note against the retired partner.

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On the other side, the evidence shows, if not an authority on the part of *Robinson* from his partner *Allen*, at least a ratification by the latter of his acts. *Allen* testifies that *Robinson* took the books and collected the debts due the firm, to which it appears he made no objection; and we can not imagine that a practising attorney, who was of course fully aware of his rights, would stand by and permit his co-partner to appropriate the entire effects of the concern to his own use without authority or right. He states his understanding, also, that the private accounts of himself and *Robinson* were paid for in the services they were rendering. This shows that so far as the accounts were concerned, they were settled according to the understanding of *Allen*, and it furnishes a strong implication that *Robinson* had authority to make the settlement in the manner it was done. If the case rested here, however, we should not disturb the verdict. But *Allen* testifies that he and *Kendall* and *Robinson* were together at a Probate Court, when he, as the administrator of an estate which was indebted to *Merkle, Kendall & Co.*, paid *Kendall* 15 dollars, which *Kendall* there paid *Robinson* on the note. To this there is no pretence that any objection was made. If *Robinson* had no right to receive the money on the note, it would have been a fraud upon *Merkle, Kendall & Co.* for *Allen* to stand by, and without objection let the money

May Term, 1855. *be so paid. Suppose Allen and Robinson were to sue them on the account, and this fact were proved; can it be doubted that it would defeat a recovery? We think it*
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 THE STATE. *was a ratification; and we are not able to resist the conclusion that although the settlement made by George Merkle and Robinson may possibly have been unauthorized, the transaction was ratified by Kendall on one side, and by Allen on the other.*

Per Curiam.—The judgment is reversed with costs. Cause remanded, with instructions to the Circuit Court to grant the plaintiff a new trial on the payment of the costs in the Circuit Court.

H. W. Chase, for the appellant.

G. S. Orth and *E. H. Brackett*, for the appellee.



RENO v. THE STATE on the relation of ACKERETT.

A cause was submitted after May 28, 1853, and before the statute dispensing with printed briefs was enacted, on a general assignment of errors, without brief. *Held*, that the failure to specify any error was a tacit admission that none existed.

Tuesday,
June 5.

ERROR to the Jackson Circuit Court.

STUART, J.—This case stands submitted since May 28, 1853, on a general assignment of errors, without brief.

The failure to specify any error is a tacit admission that none exists.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

F. Emerson, for the plaintiff.

W. T. Otto, for the state.

LAMSON v. FALLS.

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1855.

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v.	145	237
FALLS.		

Suit for foreclosure. The mortgage was given to secure the payment of a note. To a paragraph of the answer setting up that neither the note and mortgage, nor copies thereof, had been filed with the complaint, the plaintiff replied that the note and mortgage were left in the clerk's office when the complaint was filed. *Held*, on demurrer, that the reply was insufficient.

A reply is only necessary when new matter is set up in the answer.

A demurrer to a reply was erroneously overruled, but the issue tendered by the reply was complete without it. *Held*, that the error was unimportant.

The copy of a written instrument upon which a pleading is founded is "filed with the pleading," within the meaning of the R. S. 1852, if it is set out in *hæc verba* in the pleading.

Suit by the assignee of a note and of a mortgage given to secure it, for foreclosure. Answer, that the plaintiff was not the real party in interest. *Held*, that the answer was insufficient.

Interrogatories were filed to elicit evidence in support of a paragraph of an answer which was itself insufficient. *Held*, that an exception to the interrogatories was correctly sustained.

APPEAL from the *Wayne* Circuit Court.Tuesday,
June 5.

DAVISON, J.—The complaint states that *Lamson* executed a note, and a mortgage to secure its payment, to one *Estep*, who assigned each of them to *Falls*; also that the original note and mortgage were filed with the complaint; in which they are set forth in *hæc verba*. The prayer is that the mortgage be foreclosed, &c.

The defendant, in his answer, set up, 1. That *Estep*, and not *Falls*, is the real party in interest in this suit. 2. That he has fully paid said note. 3. That the original note and mortgage, or copies thereof, were not filed with the complaint.

The defendant also filed three interrogatories, to each of which he required the plaintiff's answer on oath, viz., 1. State whether *Estep* is not the real party in interest in this suit? 2. Did you pay *Estep* any consideration for the assignment of said note? 3. Have you any interest in this suit, and, if so, what amount, and when did it accrue?

To the first paragraph of the answer the plaintiff demurred, and for cause alleged generally that it contained no

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defence, &c. There was a reply in denial of the second; and to the third he replied that the note and mortgage were left in the clerk's office when the complaint was filed, and when the defendant called for them he was informed by the clerk that they were there and he could have them, &c. To this reply there was a demurrer, on the alleged ground that it neither admits nor denies the allegation in said third paragraph, nor does it set up any new and sufficient matter in avoidance. Subsequently the plaintiff amended his third reply by the addition of these words: "And the said note and mortgage were on the 22d of *August*, 1853, marked filed by the clerk." Thereupon the Court overruled the demurrer.

The plaintiff also excepted to the interrogatories, on the ground that the defendant was not entitled to the relief sought, which exception was sustained. The demurrer was then sustained to the first paragraph of the answer. The cause was submitted to the Court for trial, which resulted in a decree for the plaintiff.

Was the demurrer to the plaintiff's reply properly overruled?

The code provides that "when any pleading is founded on a written instrument or account, the original or a copy thereof must be filed with the pleading." 2 R. S. 1852, p. 44. To file a paper "is considered an exhibition of it to the Court, and the clerk's office in which it is filed represents the Court for that purpose. It is effected by delivering the paper, indorsed with the title of the cause and the attorney's name, to the clerk of the Court in which the action is pending, who marks it 'filed,' adding the date, and deposits it under the proper head among the papers or files in his office." 2 Burrill's Law Dic., p. 489. It is said that the averment in the reply, viz., "that the note and mortgage were left in the clerk's office when the complaint was filed," should be considered evidence of the filing. We think differently. The provision above quoted seems to be imperative. It requires the instrument, or a copy of it, to be filed with the pleading. The mere leaving the instrument with the complaint would not be within the

intent of the statute. It should be left for a purpose, viz., as part of the case. The purpose of leaving the note and mortgage, should have been stated in the reply as a fact, and not left to inference.

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But was the reply at all necessary to complete the issue relative to the question of filing the instruments? If not, then it was redundant, and, of course, obnoxious to that objection. It is evident that the reply did not set up new matter in avoidance, because the complaint expressly avers that the note and mortgage were filed with the pleadings, which averment is directly denied by the answer. Here, then, was an issue complete in itself without any reply. The answer contains no new matter in relation to the filing of the instruments, and a reply is only admissible when new matter is set up in the answer. 2 R. S., p. 42.

The demurrer was well taken; but the error committed by overruling it can not be allowed to reverse the judgment, as a fair trial on the merits of the cause could not have been, in any degree, impeded by the ruling of the Court. 2 R. S., pp. 50, 163. The complaint contains literal copies of the note and mortgage. These were evidently filed with the complaint when the suit was commenced; and this, it seems to us, was a sufficient filing of a copy of the instrument, within the meaning of the statute. No doubt the object of the provision was to give the defendant an opportunity, at the earliest stage of the proceeding, to inspect the subject-matter on which the plaintiff grounded his action. This purpose is well attained by setting out in the complaint a true copy of the instrument, and filing both at the same time. The record shows that in the present case this has been done. No injury could, therefore, result to the defendant from the action of the Court in overruling the demurrer.

The next inquiry is, was the demurrer to the first clause in the answer correctly sustained?

"Every action must be prosecuted in the name of the real party in interest." 2 R. S., p. 27. The appellee contends that the assignment of the note and mortgage being admitted, his right to sue can not be controverted; that

May Term, 1855. the statute enables the true owner to sue, but it does not forbid a suit by one who appears to be the legal owner.

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This position is not strictly correct. The law is imperative that the party in interest must be the plaintiff. But the real question to be considered is, does the first paragraph of the answer sufficiently show that *Falls* is not that party? It simply says that *Estep*, and not *Falls*, is the real party in interest; but this is said in the face of the assignment, the effect of which is to deprive *Estep* of all interest in the subject of the suit. By the statute the assignee of a note, &c., is specially authorized to sue in his own name, and such assignment is full proof of his title until specifically denied. 1 R. S., p. 378. The defect in the paragraph in question is, that, in effect, it admits the assignment of the note and mortgage, but does not contain such a statement of facts as would enable the Court, in view of the assignment, to say, as matter of law, that *Falls* is not the real party in interest. We are not prepared to say that a denial of the assignments is the only mode of averment that would render the pleading effective. What we decide is, that the first paragraph of the answer, as it now stands, is defective, and constitutes no defence to the action. *Arthur v. Brooks*, 14 Barb. 533.

From what has been said, it follows that the defendant had no right to the discovery sought by his interrogatories. The plaintiff's exceptions were correctly sustained.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. S. Newman and *J. P. Siddall*, for the appellant.

J. Perry, for the appellee.

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Courts of equity do not generally view time as of the essence of a contract; but if it appears from the terms of the contract or the conduct of the parties, that the design of the parties was to render it essential, it will be so regarded.

APPEAL from the *Clinton* Circuit Court.

May Term,
1855.

DAVISON, J.—This was a suit in equity for the specific performance of a contract to convey real estate. *Ewing*, on the 24th of *April*, 1852, executed to *Crouse* the following instrument:

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Tuesday,
June 5.

“Received this day of *Daniel B. Crouse* 100 dollars, as part payment of certain lands,” (describing them,) “which I have at this date sold to him for 4,000 dollars, to be paid as follows: 900 dollars by the first day of *October* next; 1,000 dollars on the first of *January*, 1853; and the remainder in two equal annual payments. On the receipt of the first payment and the execution of a mortgage on the above-described property, I bind myself,” &c., “to execute and deliver to *Crouse* a deed in fee for said lands. Should *Crouse* fail to make the first payment promptly, the herein receipted 100 dollars shall be considered a forfeiture on the part of *Crouse*, and all obligation on my part be null and void. *Thomas Ewing*.”

There is in the record an agreed statement of facts, which is as follows: At the time of the above contract, *Crouse* held from *Ewing* a few acres of said lands, under an unexpired lease, which, by their mutual assent, was then cancelled. The parties met on the 25th of *September*, 1852. On that day *Ewing* and wife executed a deed in fee simple for the premises to *Crouse*, who then made his notes to *Ewing* for 3,000 dollars; also a mortgage on the same lands to secure their payment; all of which were deposited with one *John H. Smith*, who, by agreement, was constituted the agent of both parties. *Smith* was to deliver over the deed, notes and mortgage to the parties respectively entitled to them, on the payment by *Crouse* of the said 900 dollars on the 1st of *October*, 1852. At that time, viz., the 25th of *September*, *Ewing* told *Crouse* that his personal property was advertised for sale on the 2d of *October*, and he expected to start for *Wisconsin* on the fourth of that month; that he could not move unless he got his money; and if he, *Ewing*, did not get it, he would move into the house on the premises. *Crouse*, in reply, told him that he should not be disappointed.

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On the second day after the deed, &c., were deposited with *Smith*, *Crouse* started for *Ohio* on business. At that time he held two notes, one for 600 dollars and another for 300 dollars, both due and on reliable men, each of whom promised the money by the 1st of *October*. Before leaving he directed his agents not to fail in getting the money for *Ewing*; if not on the notes, by some other means. *Ewing*, on the said 1st of *October*, demanded the 900 dollars of *Crouse's* agents, when he was told by them that it could not be raised; that there was nothing but promises for it, and they could not be relied on; that he was then safe, and they would advise him to keep himself safe. *Smith* then delivered the deed deposited with him to *Ewing*, who declared the contract no longer obligatory, and that he would take possession of the premises. He stopped the sale of his personal property and on the next day took possession. After this, on the fifth of the same month, one of *Crouse's* agents tendered the 900 dollars in bank paper, and also the notes and mortgage; but *Ewing* refused them, saying it was too late, that he was no longer bound, and that the bank bills were no money at all—nothing but rags. Afterwards, and before the institution of this suit, *Crouse* tendered 900 dollars in specie, and it being refused by *Ewing*, deposited it in the clerk's office of said Court.

It was proved that *Crouse* did work, such as grubbing and cutting down underbrush on the premises, which cost him 50 dollars, but which was of no value to *Ewing*. The lands, at the time of the contract, were in possession of a tenant of *Ewing*, whose term expired on the said 1st of *October*.

The bill prayed that a specific performance of the contract be enforced against *Ewing*; and the Court on a final hearing rendered a decree in accordance with the prayer.

The proofs clearly show that the vendee failed to pay or tender the 900 dollars on the day stipulated; but he contends that the language of the contract relative to the forfeiture, viz., "should *Crouse* fail to make the first payment promptly," &c., does not confine it absolutely to the day;

that in ordinary parlance, to pay "*promptly*" is to pay on the day the money is due or shortly after.

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1855.

This position, it seems to us, is not strictly correct. The contract stipulates that the money shall be paid by the first day of *October*. And we perceive nothing in the force of the term *promptly* sufficient to extend the day of payment beyond that period. From the whole contract, it is evident that the parties intended to limit the time of payment of the 900 dollars to the day specifically named; and the word "*promptly*" must be so construed as to be consistent with their intention.

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The main point of inquiry is, whether the vendee is entitled to a specific performance? Having failed to perform at the time agreed on, he could not have sustained a remedy at law. But Courts of Equity do not generally view time as being of the essence of the contract, unless it appear from its terms or the conduct of the parties that the design of the contractors was to render it essential. 7 Blackf. 227.—2 Story's Eq. Jur., s. 776.—1 Sugden on Vendors 426. "In the ordinary case of the purchase of an estate, the general object alone is the sale for a given sum, and the stipulation as to the day of payment in truth means that the purchase shall be completed within a reasonable time. But where it necessarily follows from the nature and circumstances of the contract, that the parties intended to stipulate for a particular thing to be done at a particular time, such a stipulation should, even in a Court of Equity, be carried literally into effect."

There is, indeed, something peculiar in the language of the present contract. It provides for a special forfeiture in case the money should not be paid *promptly*, and then declares that in the event of such failure to pay, "all obligation" on the vendor's part shall be "null and void." These provisions seem to show that the parties, at the time of the sale, contemplated a literal performance within the period named. But suppose this view to be incorrect, we think their subsequent conduct affords sufficient proof that both of them regarded and "expressly treated" the time agreed on for the payment of the 900 dollars as an

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essential element in the contract. This conclusion is not doubtful when the various transactions which occurred between the parties on the 25th of *September* are considered. *Crouse* was then, in effect, reminded that "the time" was material, and his reply indicates that he so understood it. And moreover when *Ewing* was advised by *Crouse's* agents that the money could not be raised, it appears to us that he had a perfect right to abandon the contract. Whether the vendee can or not recover the money advanced when the contract was executed, or for improvements made on the lands, are questions that do not arise in the record, and upon which no opinion is given.

What we decide is, that the complainant has not made such a case as entitles him to a specific performance. *Slaughter v. Harris*, 1 Ind. 238.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

H. Allen and *J. F. Suit*, for the appellant.

S. A. Huff, *R. C. Gregory*, *R. Jones* and *J. W. Blake*, for the appellee.

CARLISLE v. THE TERRE-HAUTE AND RICHMOND RAILROAD COMPANY.

A., by his note, promised to pay to the *Terre-Haute and Richmond Railroad Company* 200 dollars, in consideration that they would locate their depot on block 94 in *Indianapolis*, to be paid when the company should commence the construction of the depot. When the note was given the line of road provided for by the charter of said company extended from *Terre-Haute*, through *Indianapolis*, to *Richmond*, a distance of 150 miles. The company afterwards procured from the legislature, and accepted, an alteration of their charter, by which their line of road was limited to the distance between *Terre-Haute* and *Indianapolis*, being thus reduced in length one-half, and the other part of the line was placed under a separate corporation denominated the *Indiana Central Railway Company*, which constructed its road, and located its depot in another part of *Indianapolis*. The first-named company

constructed a freight-depot alone on said block 94. A. was not a stockholder in the company nor a party to the charter.

Held, that by the alteration of the charter of the *Terre-Haute and Richmond Railroad Company* and the acceptance thereof by the company, the company became substantially a different corporation and were unable to perform the condition upon which the note was to become payable.

Held, also, that the circumstance that the depot located on block 94 was of some advantage to A. was of no importance.

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v.
THE TERRE-HAUTE AND
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RAILROAD
COMPANY.

Tuesday,
June 5.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Assumpsit upon a promissory note as follows:

"For value received, I promise to pay to the *Terre-Haute and Richmond Railroad Company* two hundred dollars, without relief from valuation or appraisement laws, in consideration that they locate their depot on block 94 in *Indianapolis*, to be paid in flour at my mill when said company shall commence the construction of said depot. May 16, 1849. *John Carlisle*."

The declaration avers that said company had located their depot on block 94, and commenced its construction; and also that they had been ready, at said *Carlisle's* mill, to receive, and had requested him to deliver, the flour mentioned, but that he had failed and refused, &c.

The defendant, *Carlisle*, pleaded the general issue; the cause was tried by the Court; and the plaintiff, the railroad company, had judgment on the note.

The evidence appears of record.

The facts material to the decision of the cause may be very briefly stated.

When *Carlisle* gave the note sued on, the line of road provided for by the charter of the *Terre-Haute and Richmond Railroad Company* extended from *Terre-Haute*, through *Indianapolis*, to *Richmond*, a distance, in round numbers, of one hundred and fifty miles. Subsequently the company procured from the legislature, and accepted, an alteration of their charter, by which their line of road was limited to the distance between *Terre-Haute* and *Indianapolis*, being thus reduced in length to seventy-five miles, one-half the original extent; and that part of the line from *Indianapolis* to *Richmond* was placed under a

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separate corporation, called the *Indiana Central Railway Company*, which corporation has constructed the road, and located its depot in another part of the city.

The additional facts appear, that it was represented to *Carlisle*, as an inducement for his giving the note in question, that the depot to be erected was for freight and passengers, whereas but an indifferent freight depot had been built, the company having made a permanent arrangement for discharging passengers elsewhere; but these facts will not enter into the decision of the cause.

It is also shown that the freight depot actually erected is a benefit to *Carlisle*, but of much less benefit than would have been the depot for the whole line of the road.

As joint stock companies and partners can not use the joint property except within the scope of the original undertaking, without the consent of each member, so it appears to be settled that a corporation can not adopt a fundamental change in its charter, as regards the undertaking proposed originally, without releasing such stockholders as do not assent to the change. *Stevens v. The Rutland and Burlington Railroad Company*, 1 Am. Law Register 154.—*The Hartford and New-Haven Railroad Company v. Craswell*, 5 Hill (N. Y.) R. 383. This doctrine has been modified to some extent by the case of *The Schenectady and Saratoga Plank Road Company v. Thatcher*, 1 Kernan (N. Y.) R. 102, when applied in cases where the charter, as was the case in that of the *Terre-Haute and Richmond Railroad Company*, contains a clause allowing the legislature to alter or amend it by subsequent legislation. In such cases it is held that the stockholders becoming parties under the charter can not complain, at least, of such alterations as are not prejudicial to their interests. But it is not our purpose to discuss the question how far, under such a provision in the charter, alterations may be made without the consent of and without releasing stockholders. The doctrine can have no application in this case. *Carlisle* was not a stockholder—not a party to the charter. The alteration was greatly detrimental to him, and was fundamental. It severed, if

it did not annihilate the old, and created from the parts two new corporations. The change was sought by the company and not thrust upon it by the legislature. But we do not rest this case strictly upon these grounds. *Carlisle's* is a case of contract—contract with a particular company. He agreed to give the amount sued for to a corporation owning the line of a railroad from *Terre-Haute* to *Richmond* and intending to construct such road, if said corporation would locate its depot at a particular place. No such corporation has located a depot at the place named. A corporation to build a road from *Terre-Haute* to *Richmond*, one hundred and fifty miles, is substantially a different corporation from one created to build a road from *Terre-Haute* to *Indianapolis*, seventy-five miles. Hence the condition precedent in this case has in no manner been performed by the company, and the company to which the donation was subscribed is not suing to obtain it.

It is of no consequence that *Carlisle* is benefited, to some extent, by the depot located. Every property-holder in the city is more or less benefited by every depot constructed in it. Still, suits could not be sustained to recover for such benefits. Companies must locate their depots somewhere in business places for their own advantage, and without the request of any citizen; and the *Terre-Haute and Indianapolis Company* might have located theirs where it now is whether any donations had been offered or not. And if not at that point, at some other which would have equally benefited Mr. *Carlisle*. At all events, he might not have been willing, and has not agreed to give anything for the depot that has been located.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

L. Barbour and *A. G. Porter*, for the appellant.

J. Morrison and *S. Major*, for the appellees.

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LEDYARD and Others v. CHAPIN and Others.

LEDYARD

v.

CHAPIN.

A. and others obtained judgments at law against B., who was the owner of a tract of land, but had no other property subject to execution. *Held*, that a bill would lie on behalf of the judgment-plaintiffs to remove a cloud from the title.

When the money to secure which a mortgage has been executed is fully paid, the mortgage is *functus officio* and inoperative for any purpose.

Tuesday,
June 5.

APPEAL from the *St. Joseph* Circuit Court.

PERKINS, J.—Bill in chancery by *Small, Williams & Co.* and *Chapin*, for the use, &c., against *Ledyard* and others, to procure the removal of a cloud hanging over the title to real estate. Decree below for the plaintiffs.

The plaintiffs in the bill obtained judgments at law against one *Barbour*, took out executions and levied them upon certain real estate of which they claimed that he was the beneficial owner, but which was incumbered by a mortgage executed to the *American Life Insurance and Trust Company*, and assigned to one *Ledyard*, for, of principal and interest, near 15,000 dollars, an amount greater than the value of the lands mortgaged. *Barbour* has no other property out of which the judgments can be collected, and the judgment and execution-plaintiffs have a right, therefore, to this bill to remove the incumbrance, if invalid.

The record is one of great length, but the point is in a nutshell, and turns upon a simple question of fact.

Barbour executed the mortgage in question, to be used by *Smith* as collateral security for a loan to be made to himself by the *Life Insurance and Trust Company* above mentioned. It was deposited with other securities by *Smith* with that company, and a loan obtained. Subsequently it was arranged that the securities might be successively redeemed and withdrawn, by paying the proportion of the loan respectively assessed upon each. On this mortgage by *Barbour* the assessment was a fraction over 1,000 dollars. At this stage, *Smith* makes an arrangement with *Ledyard*, that if he will pay him, *Smith*, 2,000

dollars, he will have the insurance company, when he redeems the mortgage, assign it over to him, *Ledyard*; and accordingly *Smith* pays the insurance company 1,050 dollars, withdraws the mortgage, gets the company to place upon it an assignment to *Ledyard*, to whom *Smith* delivers it, and receives his 2,000 dollars for a seven per cent. 10,000 dollar mortgage. *Ledyard* is now seeking to enforce this mortgage, amounting to about 15,000 dollars, against *Barbour's* real estate, *Barbour* never having received any consideration for the mortgage. *Ledyard* undoubtedly knew all the circumstances. If he did not, he must have been grossly careless and stupid.

When the mortgage was taken up by paying the amount it was deposited to secure, it was *functus officio* and dead, and could be no longer available in the hands of any one. This fact disposes of the case, and at the same time shows it to be fraud on the part of *Smith* and *Ledyard* to seek to enforce it—a fraud upon *Barbour* and his creditors, unless, indeed, which may be the case, *Barbour* is a secret party to the transaction between *Smith* and *Ledyard*, and to reap, or share in, the benefit expected to be derived from it; and, at all events, a fraud upon *Barbour's* creditors.

Per Curiam.—The decree is affirmed with costs.

J. L. Jernegan, for the appellants.

J. A. Liston and *J. W. Gordon*, for the appellees.

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1855.

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v.
SPENCER.

KENTON v. SPENCER.

Bill to foreclose a mortgage. The defendant having pleaded certain matters in defence, the cause was continued in order to take depositions. At the next term the defendant moved for another continuance, upon his affidavit alleging that notice was given by him for taking depositions at *M.*, &c.; that the parties attended, when the plaintiff proposed to examine two witnesses first, the defendant waiving notice, and that afterwards those of the defendant should be examined, to which arrangement he assented, fully

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understanding that he was to have an opportunity to examine his witnesses afterwards; that the plaintiff's witnesses were examined, consuming most of the allotted time; that one witness was examined for the defendant, when the hour of four arrived and the plaintiff refused to proceed further in taking depositions; that the officer who was taking the depositions decided that he could not proceed without the consent of the parties; that the plaintiff immediately left the town and he had not time to serve him with another notice and take the depositions before the term; that he then had witnesses ready to be examined, by whom he expected to prove most of the matters alleged in his answer by way of defence, and that the affidavit was not made for delay, &c. *Held*, that under the circumstances, the defendant had a right to a continuance.

Where junior mortgagees are made defendants to a bill of foreclosure, and make default, the Court can not order a payment of their respective mortgages, but should merely foreclose such mortgagees in favor of the plaintiff.

Tuesday,
June 5.

ERROR to the *White* Circuit Court.

GOOKINS, J.—Bill in chancery by *Spencer* against *Kenton* and wife, to foreclose a mortgage. *Kenton* pleaded that *Stockwell* and others were junior mortgagees of the same premises, whereupon the plaintiff amended his bill and made them parties. *Kenton* answered, admitting the execution of the mortgage to the plaintiff, and setting up certain matters of defence in avoidance, to which the common replication was filed, and the cause was continued until the next term for depositions. The holders of the junior mortgage made default. At the term to which the cause was continued, *Kenton* moved on affidavit for another continuance. The motion was denied, and the cause was set down for hearing. A decree of foreclosure was rendered for the amount of *Spencer's* mortgage, and an order of sale was made, with directions to the sheriff, after discharging the plaintiff's debt, to satisfy the junior mortgage, without specifying any amount, and to pay the overplus to *Kenton*.

The motion for a continuance was founded on an affidavit, stating that notice was given by the defendant for taking depositions at *Monticello*, on the 29th of *April*, between 10 and 4 o'clock; that the parties attended, when the plaintiff proposed to examine two witnesses first, the defendant waiving notice, and that afterwards those of the defendant should be examined, to which arrangement

he assented, fully understanding that he was to have an opportunity to examine his witnesses afterwards; that the plaintiff's witnesses were examined, consuming most of the allotted time; that one witness was examined for the defendant, when the hour of four arrived, and the plaintiff refused to proceed further in taking the depositions; that the officer who was taking the depositions decided that he could not proceed without the consent of the parties; that the plaintiff immediately left the town, and he had not then time to serve another notice and take his depositions before the term; that he then had witnesses present, ready to be examined, by whom he expected to prove most of the matters alleged in his answer by way of defence, and that the affidavit was not made for delay, &c.

The *placita* is defective, and does not state when the term of the Circuit Court commenced, but *Kenton's* affidavit was made on the 5th day of *May*, and is stated to have been sworn to in open Court.

We think the special circumstances set forth in this affidavit showed sufficient grounds for a continuance, and that it ought to have been granted. It is evident that the defendant was deprived of his testimony by a trick which ought not to receive the sanction of a Court of justice. It is answered that the defendant had himself been negligent in getting his testimony, by delaying until so near the beginning of the term. It is true he might have begun sooner; nor are we to encourage negligence; and if the plaintiff had done nothing wrong, this application could not have been listened to. But the defendant was there, ready to examine his witnesses. He waived his right at the plaintiff's request. The officer mistook his duty. He might have adjourned over until the following day, if necessary, which necessity, if it occurred, was induced by the plaintiff. We might hesitate if this were a judgment at law, the reversal of which might occasion a loss of the plaintiff's lien; but as it is a proceeding to foreclose a mortgage, the plaintiff is in no danger of ultimate loss. If he is delayed, it will be in consequence of his own act, of which he can not complain.

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KENTON
V.
SPENCER.

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DILLING
v.
MURRAY.

The decree is erroneous in ordering the payment of the junior mortgage by the sheriff, without fixing the amount; but for that error the plaintiff is not answerable. He had no control of the mortgage, and could not give it in evidence. It may have been paid. If the junior mortgagees did not choose to assert their rights, all the Court could do was to foreclose them in favor of the plaintiff.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

R. C. Gregory and *R. Jones*, for the plaintiff.

D. D. Pratt and *H. Allen*, for the defendant.

DILLING v. MURRAY.

Proceeding by *A.* against *B.* to enjoin *B.* from obstructing the flow of the water of a stream to *A.*'s mill, by the manner of erecting and maintaining a dam above it. The complaint stated that for, &c., the plaintiff had been the owner of a mill, &c., propelled by water on his own land; averred the recovery of a judgment against *B.* for such obstruction; that the defendant still kept up the dam, &c.; and that *A.*'s mill had thereby been rendered valueless. *Held*, that the complaint was not defective for omitting to show that the obstruction of the water was unnecessary to *B.* in the fair and reasonable use of the stream.

A party to a judgment can not impeach it collaterally, on the ground that it was rendered upon false testimony.

Every riparian proprietor has an equal right to the flow of the water through his land; and no one has a right to use it to the material injury of those below him. If he diverts the stream, he must return it to its natural channel when it leaves his estate.

But it is not every injury to a proprietor below that will confer a right of action: it is necessary, in every such case, to take into consideration the capacity of the stream, the adaptation of machinery to it, and all the attendant circumstances; and when all these are properly considered, if the proprietor below is materially injured, when considered in relation to the facts of the particular case, he is entitled to redress.

Wednesday,
June 6.

APPEAL from the *Wayne* Court of Common Pleas.

Gookins, J.—This was a proceeding instituted by *Murray* against *Dilling*, in the *Wayne* Circuit Court, and trans-

ferred to the Common Pleas, the object of which was to enjoin *Dilling* from obstructing the flow of the water of a stream to the plaintiff's mill, by the manner of erecting and maintaining a dam above it.

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v.
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The complaint states that for fourteen years the plaintiff has been the owner of a mill and manufactory propelled by water on his own land; that in the spring of 1850 the defendant erected a dam across the stream above the plaintiff's land, by which the water was diverted from its natural channel, and the flow of it to his mill prevented; that he brought an action against the defendant for said injury, to which he pleaded not guilty, and in *August*, 1851, he recovered a judgment against the defendant for the damages he had then sustained; that the defendant keeps up his dam, and still prevents the flow of the water; and that his mill, which was worth 3,000 dollars, is thus rendered valueless.

The defendant demurred to the complaint, because it did not show that the obstruction of the water was unnecessary to the defendant, in the fair and reasonable use of the stream. The demurrer was properly overruled. It does not appear from the complaint that the defendant had any use for the water. He is not charged with the erection of a mill, but a dam.

The answer admits the erection of the plaintiff's mill; but avers that for ten years previous thereto the defendant had had in full operation a mill just above it on the same stream, and had been accustomed to use all the water of the stream; that since the erection of the plaintiff's mill he has so used the water as to preserve the plaintiff's rights as far as in his power. He admits the recovery of the judgment, but seeks to impeach it for testimony given on the trial which he says was false. He states that his mill is on his own land; and that he always intends to use the water with every possible regard to the plaintiff's rights. He denies having diverted the stream, but alleges that he uses the water for his mill, and then permits it to flow freely down the channel; and particularly since said trial he has not allowed the water to be retained when he

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MURRAY.

was not using it himself. He claims that having erected his works long before the plaintiff's, he has a paramount right to the use of the water, doing him no unnecessary harm.

The plaintiff demurred to so much of the answer as sought to impeach the judgment, and the demurrer was correctly sustained. The reply denies the affirmative matter set up in the answer.

There was a trial by the Court, which resulted in a judgment for the plaintiff, and an order that the defendant should take down and remove a dam across the stream mentioned in the complaint, called the new dam, so as not to obstruct the waters of the stream; and the defendant was further ordered so to regulate and use the water at his works as not to detain the same longer than three hours at one time, except in the night, and that he commence letting it out early in the morning, and was enjoined from using the water otherwise.

It appears from the evidence taken in the cause, that the defendant was the owner of an oil-mill, the machinery of which was propelled by water taken from the stream, by means of a dam and race, all upon his own land. How long his mill had been erected does not appear. About fourteen or fifteen years ago, but since the erection of the defendant's mill, the plaintiff erected a woolen factory and saw-mill, about half or three-quarters of a mile below the defendant's, supplied by water in the same manner, and situated upon his own land. The capacity of the stream was not such as to furnish a constant supply, except in time of high water; and at low and ordinary stages the water was used by gathering heads. The plaintiff seems to have had usually a sufficiency of water at his mill until 1850, when the defendant erected a saw-mill, on the same race, below his oil-mill; and constructed a new dam, below and near the old one. Overshot wheels had been previously used in the plaintiff's and defendant's mills, but the wheel used in the saw-mill was of the kind called flutter-wheels, and required about three or four times as much water as the former kind. Since the erection

of the new dam and saw-mill, the plaintiff has not been able to run his establishment more than half as much as before.

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MURRAY.

The rule of law which governs cases of this kind is well established. Every riparian proprietor has an equal right to the flow of the water through his land, and no one has a right to use it to the material injury of those below him. He has no property in the water itself; but only a right to use it as it flows along. If he diverts the stream he must return it to its natural channel when it leaves his estate. This rule is laid down by Ch. *Kent*; 3 *Kent's Comm.* 439; and is the clear result of all the authorities. But it is not every injury to a proprietor below that will confer a right of action, or justify an order to remove the obstruction. In every detention of water for the purposes of machinery, there is some loss by evaporation and absorption; and, especially in a stream like this, there would necessarily be some irregularity in the flow of the water. *Pothier* lays down the rule, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. The rule thus stated is too strong for the present case; the capacity of the stream being such that the water, if used at all, can not be allowed to maintain a continuous and regular flow.

This question was much considered in the case of *Palmer v. Mulligan*, 3 *Caines* 307, where a majority of the Court, *Kent* and *Thompson, Js.*, dissenting, held, that although the erection of a dam above made it so much more difficult for the owner of a mill below to bring logs to his mill as to require an additional hand for every twenty-five logs, and though the rubbish from the upper mill was an inconvenience to the proprietor of the lower, to the amount of 250 dollars a year, yet these were injuries for which the proprietor below had no remedy.

The difficulty is not so much in the rule as in the application of it; in which it is necessary to take into consideration the capacity of the stream, the adaptation of machinery to it, and all the attendant circumstances; and,

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when all these are properly considered, if the proprietor below is materially injured; that is, materially, when considered in relation to the facts of the particular case, he is entitled to redress. In the case above referred to, the mills were upon the *Hudson* river, which is a large stream; and even these two of the judges thought the plaintiff ought to recover. An injury to the same extent to a mill situated upon a small stream would doubtless have entitled the plaintiff to an action.

In the case before us, the proof shows that the dam which was ordered to be removed was an obstruction to the stream; and that if so used as to gather a head of any considerable use to the saw-mill, it would occasion an unreasonable detention of the water. It was properly ordered to be removed. Although there is much conflicting testimony in regard to the capacity of the stream, there is very little, if any, in regard to the quantity of water required to propel the saw-mill wheel. The proof on that point tended strongly to show that the wheel was unsuited to the stream. Upon the whole case, we think the judgment ought to be affirmed.

Per Curiam.—The judgment is affirmed with costs.

J. Rariden, for the appellant.

J. S. Newman, J. P. Siddall and J. B. Julian, for the appellee.

6	328
137	268
6	328
166	366

MASON v. TONER.

A demurrer, under the code of 1852, does not extend beyond the pleading to which it is addressed.

Suit upon a note, due *December 25, 1852*, containing a stipulation that it might be discharged in notes on good solvent men, due when the note in suit should mature. *Held*, that up to the close of the 25th of *December, 1852*, the maker might have discharged the note in suit by a tender of notes as stipulated, but that upon a failure to do so by that time, he became liable as on a purely money demand.

APPEAL from the *Brown* Circuit Court.

STUART, J.—*Toner* sued *Mason* on a promissory note. Judgment in favor of the plaintiff for the amount of the note and interest.

On the appeal to this Court two points are made, in each of which it is insisted that the Court below erred. The first arises on demurrer. There was a demurrer filed to a paragraph of the answer and sustained. It is urged that the demurrer should have been overruled because the complaint is bad. Our statute, it is argued, is *almost* a literal copy of the *New-York* code on the subject of demurrer; and in that state the demurrer reaches back to the first error in the pleadings. *Schwat v. Furniss*, 1 Code R. (N. S.) 342. Counsel have misled themselves by the word *almost*. It will be seen, on comparison, that our statute omits a very significant clause found in the *New-York* code. That omission is fatal to the position assumed here. We have already had occasion to examine this question in *Johnson v. Stebbins*, at the last term, (5 Ind. R. 364,) and see no reason to change our ruling. The demurrer, we think, under our practice act, does not extend beyond the pleading to which it is addressed.

The second point relates to the sufficiency of a tender made. It is stipulated by the terms of the note that it might be discharged in notes on good solvent men due at the time the note in suit matured. The note in suit was due *December 25*, 1852. The tender proved was on the 15th of *April*, 1853. The statement of this fact is sufficient. Up to the close of *December 25th*, the maker of the note might have discharged his obligation by a tender of the notes as stipulated. If he failed to do so, he became liable as on a purely money demand.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

J. W. Gordon, for the appellant.

M. M. Ray, for the appellee.

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MASON
v.
TONER.

Wednesday,
June 6.

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1855.

THE STATE v. HEDGE.

McCLURE

v.

PURSELL.

An indictment charged an offence to have been committed on, &c., in the year "one thousand eight hundred and fifty-too." *Held*, that the word "too" must be construed to mean the numeral "two," and not to have been used as an adverb.

Wednesday,
June 6.

ERROR to the *Blackford* Circuit Court.

STUART, J.—Indictment against *Hedge* for knowingly suffering his mare to run in what is commonly called a horse race, &c. The indictment was found in *October*, 1852. The time of the alleged offence is "the first day of *August*, in the year one thousand eight hundred and fifty-too." The point of objection is to the orthography of the last word "*too*," instead of "*two*." It was argued that "*too*" is an adverb and not a numeral; therefore, inferentially, that this was an indictment laying the offence in *August*, 1850, and so on its face barred by the statute of limitations at the time of the finding. And of this opinion was the Court. So the motion was sustained and the indictment quashed.

The Court was clearly correct on the questions of grammar and orthography; but it is said that bad grammar, and, for the same reason, bad spelling, does not vitiate.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. C. Chipman and *J. W. Gordon*, for the state.

McCLURE v. PURSELL.

Rule 30 of the Supreme Court does not apply to cases tried before June 1, 1853.

A bill of exceptions in a cause tried prior to June 1, 1853, after setting out certain evidence adduced in chief by the plaintiff, stated, "upon this evidence

the plaintiff rested his case." Certain evidence adduced by the defendant was then set out, and the bill stated, "upon this evidence the defendant rested his defence." The bill then set out certain other evidence adduced by the plaintiffs, and stated, "this rebutting testimony closed the evidence in the case." *Held*, that it sufficiently appeared that the bill contained all the evidence given at the trial.

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McCLURE
v.
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The omission by a party to traverse a material fact alleged by his adversary, is, in effect, an admission of it.

The *onus probandi* lies upon the party who substantially asserts the affirmative of the issue.

A judgment for the plaintiff, in a suit tried on the general issue, will not be reversed merely because a material special plea was not replied to, if the facts alleged in it were admissible under the general issue.

APPEAL from the *Cass* Circuit Court.

Wednesday,
June 6.

DAVISON, J.—Debt by *Pursell* against *McClure* on two promissory notes, each for the payment of 175 dollars. The notes are dated *December* 8, 1849, payable, one in twelve months, and the other in two years, to *Converse* and *Burdge*, and by them, on the 15th of *February*, 1850, assigned to *Pursell*.

McClure pleaded the general issue and five special pleas. The third, fifth and sixth pleas make no point in the case. The second and fourth are, substantially, as follows:

The second plea alleges that the notes in suit were given to *Converse* and *Burdge* for the sale and conveyance to *McClure* of the right to use and vend, &c., within certain counties, (naming them,) a new and useful improvement in machinery for cutting screws on the rails of bedsteads; and that the said *Converse* and *Burdge*, at the time, &c., represented to him that they had obtained letters patent, under the seal of the patent office, granting to them the full and exclusive right of making, using and vending the said new and useful improvement, when in truth they had not obtained such letters patent, nor had they good right and authority to vend such new and useful improvement, &c.

The fourth plea alleges that *Converse* and *Burdge*, on the said 8th of *December*, 1849, and before the assignment of the notes, by their memorandum in writing, promised *McClure*, as a condition to be performed before the payment of the notes, to furnish him, within one year

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after that date, an original power of attorney, similar to one then held by the said *Pursell*, under which he was then acting as their agent, showing his right, in their names, to execute a deed granting to *McClure* the right to use and vend the said new and useful improvement within said counties; yet that the said *Converse* and *Burdge* have not furnished or offered to furnish such original power of attorney.

To the fourth plea there was no replication; but to the second plea the plaintiff replied "that *Converse* and *Burdge* had good right and authority to vend to the defendant the right to use the new and useful improvement in said plea mentioned."

The Court, by consent, tried the cause, and found for the plaintiff 369 dollars. Motion for a new trial denied, and judgment for the plaintiff.

The record contains a bill of exceptions, which shows that the plaintiff, to maintain the issues on his part, gave in evidence the two promissory notes and the respective assignments thereon, "and upon this evidence rested his case." That thereupon the defendant introduced an instrument executed by *Converse* and *Burdge*, whereby they agreed to furnish him, within one year from the said 8th of *December*, 1849, an original power of attorney (as described in the fourth plea) as a muniment of his title; which power was to be furnished before payment of said notes was demanded, &c. That *Pratt*, a witness for the defendant, was then produced, who testified that he drew the notes and the above instrument; that the notes sued on are the same therein referred to; that their execution and that of the instrument were concurrent acts; and that he saw them executed. That "upon this evidence the defendant rested his defence;" whereupon the plaintiff introduced *B. W. Peters*, his attorney, who stated that the defendant, during the year prior to the commencement of this suit, had repeatedly offered to give him wagons in payment of one of the notes, and made no objection to paying it. That of the other note no mention was made during that time by either party. The witness also testi-

fied that the defendant expressed himself fully satisfied with his bargain in the machine. That "this rebutting testimony closed the evidence in the case."

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v.
PURSELL.

The appellant contends that upon his second plea he should have succeeded, because the issue made on that plea was not proved, and the burden of proving it rested on the plaintiff; but the appellee insists that though the evidence, as it appears in the transcript, may be insufficient to support the finding of the Court, still the judgment should be affirmed, because the record does not show that it contains all the evidence. Rule 30 of the Supreme Court relates to this subject; but the cause was tried in the Court below prior to the 1st of *June*, 1853, when it took effect. Hence the point made by the appellee must be considered without reference to that rule.

It will be seen that after the introduction of the notes and assignments thereon, the record states that "upon this evidence the plaintiff rested his case." Also at the conclusion of the testimony for the defence, it alleges that "upon this evidence the defendant rested his defence." The record then sets forth certain evidence given by the plaintiff, and avers that "this rebutting testimony closed the evidence in the case." These statements, when taken together, seem to repel any presumption that evidence, other than that contained in the record, was given on the trial.

The above replication takes issue only upon the last averment in the plea. It merely affirms that *Converse* and *Burdge* had "good right and authority to vend the improvement," thereby admitting that the sale and conveyance to the defendant was the consideration of the notes; because it is a principle applicable to all pleading, that "the omission by either party to traverse any material fact alleged by his adversary, is, in effect, an admission of it." 1 Chitty Pl. 623.—Gould Pl., c. 3, s. 167. In the present case, the affirmative of the issue made by the plaintiff's replication is not sustained by the evidence. The defendant may have offered to pay one of the notes and expressed himself satisfied with his bargain; all that, however, falls

May Term, 1855. short of proof that the vendors had obtained letters patent, or had good right to vend the improvement.

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PURSELL. But upon which of the parties devolved the *onus probandi*? Mr. *Greenleaf* says, that the rule which governs in the production of evidence is, "that the obligation of proving any fact lies upon the party who, substantially, asserts the affirmative of the issue." 1 *Greenl. Ev.*, s. 74. Again, it is said, "that the party who alleges the affirmative of any proposition shall prove it." 1 *Stark. Ev.* 376. To this rule, it is true, there are exceptions, but none of them apply to the present inquiry. 1 *Greenl. Ev.*, ss. 78, 80. We are, therefore, of opinion that under the issue taken upon the second plea, the plaintiff was bound to prove affirmatively the averment in his replication, and having failed to support that averment with sufficient proof, the defendant was entitled to a judgment.

Another ground is assumed by the appellant. No issue was taken on the fourth plea. It remains undisposed of and unanswered. That plea, no doubt, presented a material question in the case. If the vendors agreed not to enforce payment of the notes until they had furnished the defendant with the "original power of attorney" described in the plea, and have failed in the performance of their agreement in that respect, the plaintiff had no right to recover. But the defence set up by this plea, it is said, could have been made under the general issue, and the want of an issue on the plea, though erroneous, should not be allowed to reverse the judgment. We concur in that opinion. This Court has repeatedly decided that "a judgment for the plaintiff, in a suit tried on the general issue, will not be reversed merely because a demurrer to a special plea was erroneously sustained, if the matter specially pleaded was admissible under the general issue." *Shanklin v. Cooper*, 8 *Blackf.* 41.—*Fairfield v. Browning*, 1 *Ind. R.* 322. These cases, though not strictly analogous to the one before us, involve a principle which may be aptly applied to the point under consideration. The defendant has had "an opportunity to introduce the same evidence under the general issue, that he could have intro-

duced under the fourth plea." Indeed, the record shows that evidence tending to support that defence was given on the trial.

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v.
GRAY.

The testimony, however, being insufficient to support the finding of the Court, a new trial should have been granted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt and *S. C. Taber*, for the appellant.

H. P. Biddle, for the appellee.

COOK v. GRAY.

A. stipulated to deliver to *B.* fifty hogs at any time between the 10th and 20th of *November* that *B.* might choose to call for them. *Held*, that a demand by *B.* on the 19th for the delivery of the hogs on the 20th of *November* was not sufficient under the contract.

Section 787, p. 205, 2 R. S. 1852, applies only to statutory time and not to the computation of time in the case of ordinary contracts.

APPEAL from the *Rush* Court of Common Pleas.

Wednesday,
June 6.

DAVISON, J.—The complaint in this case states that the parties had entered into a written contract, whereby *Gray* stipulated to deliver to *Cook* fifty head of hogs, at any time between the 10th and 20th of *November*, 1852, that he might choose to call for them. Averment, that *Cook* demanded the hogs on the 17th of that month, but *Gray* refused to deliver them, &c.

The answer denies a demand of the hogs on the 17th of *November*, or at any other time between the above dates, and avers that *Cook* called on *Gray* on the 19th of *November*, and requested him to deliver them on the 20th of said month, which *Gray* refused, &c.

To this *Cook* replied, that he did call on *Gray* on the 19th of *November*, and request him to deliver the hogs on

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v.
PEARSON.
Wednesday,
June 6.

APPEAL from the *Pulaski* Circuit Court.

PERKINS, J.—Information in the nature of a *quo warranto*, on the relation of *William S. Huddleston*, against *John Pearson*, alleging that the latter usurped from the former the office of auditor of *Pulaski* county. *Pearson* answered. There was a demurrer to his answer, which was overruled, and final judgment given against *Huddleston*. The information was filed *March 31, 1852*.

It appears that *Pearson* was elected clerk of *Pulaski* county, in *August, 1845*, for seven years, a term not expired when the present information was filed, and we must look to our legislation to ascertain his rights in the premises.

In 1841 the office of county auditor was created, but the act (section 53) provided, that "all the duties enjoined upon the auditors of counties in this act, shall continue to be discharged by the clerks until county auditors are elected and qualified," &c. Till an auditor was elected, therefore, *Pearson*, under this act, would have discharged, in *Pulaski* county, the duties transferred to auditors. It is not shown that an auditor was elected in that county till 1851. But before that time, to-wit, in 1846, the legislature had modified the act of 1841, (L. 1846, p. 20,) thus:

"SEC. 3. That nothing in this act shall be so construed as to affect those clerks of the Circuit Courts, who now exercise the functions of auditor in those counties where the number of voters do not exceed 1,200, but they shall continue to exercise the duties of auditors, *ex officio*, until the number of voters of those counties shall exceed 1,200."

This act, in effect, abolished the office of auditor in the counties in which it operated, till they had become populous to a given extent; and the office, not being one created by the then existing constitution, the legislature had the power to pass such an act.

At this time *Pearson* was clerk of *Pulaski* county; it had no auditor; it had not, and has not yet, twelve hundred voters, and, hence, no auditor could be legally elected in it, at all events, till the coming into force of the new constitution. *Huddleston*, therefore, who claims to have

been elected auditor in 1851, was not legally elected; and *Pearson* being legally in the discharge of the duties of clerk, an office, in that county, to which belonged the duties in other counties exercised by auditors, he was, by the new constitution, continued in their exercise till the expiration of his term. *Jones v. Cavins*, 4 Ind. 305, where the reasoning upon this point will be found.

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The judgment of the Court below must be affirmed.

STUART, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is affirmed with costs.

D. D. Pratt, for the appellant.

L. Chamberlain, for the appellee.

RODEBAUGH v. HOLLINGSWORTH.

In slander, the averment in the declaration of a slanderous charge which assumes the existence of a fact, is a sufficient averment of such fact; especially on general demurrer or after verdict.

Whoredom includes every species of illicit intercourse between the sexes.

A declaration for slander by a female plaintiff, showing a charge made against her of whoredom, is good.

In slander, if the declaration is sufficient without regard to the *colloquium* or *innuendoes*, they may be regarded as surplusage.

An inference expressed in the *colloquium* or *innuendoes* in a declaration for slander, if not a correct inference from the words averred to have been spoken, can not affect the sufficiency of such averments.

Colloquiums and *innuendoes* are only necessary to remove uncertainty in the identification of persons, or in the meaning of words and sentences and their application.

In cases of such uncertainty they form a material part of the declaration and can not be rejected as surplusage.

ERROR to the *Marion* Circuit Court.

Wednesday,
June 6.

PERKINS, J.—Case for slander. The declaration follows:

"State of *Indiana*, *Marion* county. In the *Marion* Circuit Court. *Rachel C. Hollingsworth*, an infant within the

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age of twenty years, by her next friend *George Hollingsworth*, whose consent thereto in writing is filed in Court, complains of *Jacob Rodebaugh* of a plea of trespass on the case for slanderous words spoken. For that the plaintiff is, and always has been, a person of good character, and honest and chaste in all her deportment; and, until the committing of the grievances by the defendant hereinafter set forth, the plaintiff had never been suspected of the crime of incest, or fornication, or any other disgraceful or unchaste act. Yet the defendant, well knowing the premises, but maliciously intending to ruin the plaintiff's fair name and reputation, and bring her into public infamy, disgrace and scandal, in a certain conversation which he, defendant, had, to-wit, on the twentieth day of *June*, in the year eighteen hundred and forty-nine, in the presence of *Charles Hanes* and other good and worthy citizens of the state of *Indiana*, of and concerning the plaintiff, and of and concerning her being guilty of incest with her brother hereinafter named, the said defendant maliciously and falsely spoke and published, in the presence of the citizens aforesaid, of and concerning the plaintiff, and of and concerning the plaintiff's being guilty of incest with her said brother, the false, scandalous, malicious and defamatory words following, to-wit: Somebody told me (defendant meaning) that she (plaintiff meaning) acknowledged to him (meaning one *John Cropper*) that *Nero* (meaning the brother of the plaintiff) had screwed her (meaning that plaintiff's brother had carnal intercourse with the plaintiff) up stairs the night before. And again, she (plaintiff meaning) owned to him (meaning one *John Cropper*) that *Nero* (plaintiff's brother meaning) had screwed her (meaning had carnal intercourse with plaintiff) up stairs the night before. And again, I (defendant meaning) heard somebody say that *John Cropper* was there (meaning at the house of the father of plaintiff with whom plaintiff resided) one night courting *Rachel* (meaning plaintiff) and he (meaning *Cropper*) was hugging her (meaning plaintiff) and she (meaning plaintiff) asked him (meaning *Cropper*) to go into the wood-house with her (meaning plaintiff)

and he (meaning *Cropper*) went in to screw (meaning to have carnal intercourse with) her (meaning plaintiff) and when they (meaning plaintiff and said *Cropper*) were at it (meaning having carnal intercourse) he (meaning said *Cropper*) told her (meaning said plaintiff) that somebody had screwed (meaning had carnal intercourse with) her (meaning said plaintiff) before; that she (meaning plaintiff) denied it at first, then directly she (meaning plaintiff) acknowledged to him (meaning *Cropper*) that *Nero* (meaning said brother) had screwed her (meaning had carnal intercourse with her, plaintiff,) up stairs the night before. And again, I (meaning defendant) heard somebody say that *John Cropper* was at *Hollingsworth's* one night courting *Rachel* (meaning plaintiff), and he (meaning *Cropper*) was hugging her (meaning plaintiff) and she (meaning plaintiff) asked him (meaning *Cropper*) to go into the wood-house with her (meaning plaintiff), and they went in there, and he (meaning *Cropper*) got at it and was screwing (meaning was having carnal connection with) her (meaning plaintiff), and he (meaning said *Cropper*) told her (meaning plaintiff) that somebody had screwed (meaning had carnal intercourse with) her (meaning plaintiff) before; she (meaning plaintiff) denied it at first, but he (meaning *Cropper*) pinned it to her (meaning plaintiff) so tight that she (meaning plaintiff) owned it at last, and said that *Nero* (meaning her said brother) had screwed (meaning had carnal intercourse with) her (meaning plaintiff) the night before up stairs, meaning thereby that the plaintiff was and had been guilty of fornication and incest. And the plaintiff avers that the word screwed had, at the time and place when and where the said word was used by the defendant, a provincial meaning, to have carnal intercourse. And the plaintiff avers that the defendant used the said word screwed in a criminal sense, and thereby meant, and was understood by those who heard him to mean, the act of having carnal intercourse, and meant to charge, and was so understood by those who heard him, that the plaintiff was guilty of such acts with her said brother and said *John Cropper*; by means whereof the

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plaintiff has suffered in her good name, fame and reputation, and suffered damage thereby, to-wit, in the sum of two thousand dollars. Hence she sues. *Lucian Barbour*, for the plaintiff."

The defendant pleaded the general issue and a sham plea. The sham plea was demurred to, the demurrer sustained, and, as to that plea, the plaintiff had judgment.

The general issue was tried by a jury, and a verdict for 1,000 dollars was returned for the plaintiff.

The defendant prosecuted a writ of error in this Court to test the validity of the declaration which the demurrer to his sham plea brought before the Court below for judgment.

No objection is taken upon any other part of the record. We proceed to examine the declaration. Two objections are taken to it.

1. That it does not aver that the plaintiff, *Rachel*, is unmarried, and, hence, leaves it uncertain whether adultery, or fornication, or incest is charged.

We think we could not say, after verdict for the plaintiff on the general issue, that the declaration does not show, by reasonable implication, the non-marriage of said *Rachel*. It avers that she is an infant within the age of twenty years, is still living with her father, and that one person, having sexual intercourse with her, did so on a "courting" visit to her. Now, courting, in its popular acceptation, means wooing or soliciting in marriage. The very charge made against her, then, assumes that she is a feme sole; and it has been decided that where a slanderous charge assumes the existence of a fact, proof of the charge itself is a sufficient proof of the assumed fact. *Hays v. Allen*, 3 Blackf. 408.—*Hesler v. Degant*, 3 Ind. 501. By the same rule, the averment of such a charge in the declaration would be a sufficient averment of the fact assumed in it; and especially should it be so considered on general demurrer or after verdict.

So far upon the assumption that it was necessary to aver the want of marriage of the plaintiff; but we do not

mean to decide that fact. And this brings us to the second objection, which is—

2. That the words complained of in the declaration do not support the *colloquium* and *innuendoes* contained in it.

It is urged that the plaintiff, in the *colloquium* and *innuendoes*, has elected to insist upon the charge of incest; that she is bound by the meaning she has seen fit to assign to the words used; that they do not amount to a charge of incest, because they do not show the connection charged to have been between persons over sixteen years of age and with a knowledge of their relationship, and, hence, that the declaration is fatally defective, according to *Lumpkins v. Justice*, 1 Ind. R. 557. This argument proceeds on the idea that it was necessary for the plaintiff to show that a certain charge of a particular offence had been made against her. In this description of cases, where the suit is by a male plaintiff, such is the case. *Lumpkins v. Justice*, *supra*. Not so where the plaintiff is a female. By our statute it is actionable to charge a female with whoredom, a thing not in itself necessarily criminal in the eye of the law; for any act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person, is whoredom, and a single act of the kind, according to the case of *Alcorn v. Hooker*, 7 Blackf. 58, makes a woman a whore. A declaration for slander, therefore, by a female plaintiff, which shows a charge made against her of whoredom, is good. 2 R. S., p. 205, s. 788. Such is the declaration in the case before us. And it shows such a charge in its averments, independently of the *colloquium* and *innuendoes*, and independently of the question of marriage; for it avers that the defendant charged her with having sexual intercourse, on one day, with her brother *Nero*, and, on the following day, with *John Cropper*. Now, both these persons could not have been husbands of the plaintiff, and the intercourse with one, if not both of them, must have been an act of whoredom. It may have been in the one case incest, and in the other fornication; but be that as it may, in either case the act was whoredom. Whoredom is a compre-

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The declaration, then, being sufficient without regard to the *colloquium* and *innuendoes*, they may be regarded as surplusage. Any erroneous inference of the plaintiff contained in them will not vitiate averments good and sufficient without the inference. Such seems to have been the course of practice in this Court, without expressly deciding the point. See *Dodge v. Lacey*, 2 Ind. R. 212.—*Abshire v. Cline*, 3 *id.* 115.

Colloquiums and *innuendoes* are only necessary to remove uncertainty that would otherwise exist as to persons, or the meaning of words and sentences and their application. See *Hays et ux. v. Mitchell et ux.*, 7 Blackf. 117.—*Worth v. Butler*, *id.* 251.—*Roella v. Follow*, *id.* 377.—*Stucker v. Davis*, 8 *id.* 414.—Note to *Harper v. Delp*, 3 Ind. R. 225.—*Linville v. Earlywine*, 4 Blackf. 469. And in cases where they so become necessary, they form a material part of the declaration, and can not be rejected as surplusage.

Per Curiam.—The judgment is affirmed with costs.

H. O'Neal and *D. Wallace*, for the plaintiff.

L. Barbour and *A. G. Porter*, for the defendant.

EPPERLY v. LITTLE.

A declaration in assumpsit, in the Court of Common Pleas, in a suit commenced March 9, 1853, contained two counts, one on a note for 700 dollars, and the other for 200 dollars for money paid, &c. The damages in the conclusion of the declaration were laid at 1,500 dollars. The defendant having moved to dismiss the suit for the want of jurisdiction, the plaintiff, during the pendency of the motion, obtained leave to amend the declaration by stating the damages at 1,000 dollars; and, having made the amendment, the defendant's motion was overruled. The defendant then moved for a continuance of the cause, on account of the amendment, but the Court refused the motion.

Held, that, in the refusal to dismiss the suit, there was no error.

Held, also, that the amendment, not having materially changed the plaintiff's claim, did not entitle the defendant to a continuance.

A count on a promissory note averred that "the defendant, by his certain note in writing, then due and payable, promised the plaintiff," &c. *Held*, on demurrer, that the undertaking of the plaintiff was sufficiently alleged.

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APPEAL from the *Wayne* Court of Common Pleas.

Thursday,
June 7.

GOOKINS, J.—*Little* sued *Epperly*, on the 9th of *March*, 1853, in the *Wayne* Court of Common Pleas, in an action of assumpsit. The declaration contains two counts, one on a note for 700 dollars, and the other for money paid, 200 dollars. The damages in the conclusion of the declaration were laid at 1,500 dollars.

The defendant moved to dismiss the suit for the want of jurisdiction, and the plaintiff moved to amend his declaration, which was allowed, and he amended by stating the damages at 1,000 dollars; whereupon the Court refused the defendant's motion to dismiss the suit. The defendant then moved to continue the cause, in consequence of the amendment, which motion was overruled. The defendant then filed his demurrer to the first count of the declaration, which was overruled, and the plaintiff having entered a *nolle prosequi* to the second count, judgment was given for the amount of the note, and the defendant appealed.

The 11th section of the act organizing the Court of Common Pleas, 2 R. S. 1852, p. 18, gives that Court jurisdiction when the sum due or demanded, or damages claimed, shall not exceed 1,000 dollars, exclusive of interest and costs. The sums claimed in the two counts, exclusive of interest, amounted to only 900 dollars, and the plaintiff could have recovered no more. The cases of *Wetherill v. The Inhabitants, &c.*, 5 Blackf. 357, and *Swift v. Woods*, *id.* 97, are relied on by the appellant. In the former case, it is *said*, but not *decided*, as the question was not before the Court, that in assumpsit, and other actions sounding in damages, the sum laid in the conclusion of the declaration constitutes the amount of the plaintiff's claim. We think the sum so laid *limits*, but does not *enlarge* the plaintiff's claim. In *Swift v. Woods*, which was

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an action before a justice of the peace, the plaintiff, in three separate counts, claimed 50 dollars each, and there was no general conclusion limiting the demand. That case, and the case of *The State Bank v. Brooks*, 4 Blackf. 485, *Middleton v. Harris*, 6 *id.* 397, *Anderson v. Farns*, 7 *id.* 343, and *Washburn v. Payne*, 2 *id.* 216, show that if the utmost the plaintiff can recover upon his claim, as stated, is within the jurisdiction of the Court, it is sufficient to give jurisdiction. In *Tipton v. Cummins*, 5 Blackf. 571, an amendment to a declaration in debt, by inserting the amount of damages claimed, was held to be not an amendment in substance. We think there was no error in refusing to dismiss the suit.

What has already been said disposes of the second objection. The amendment made did not materially change the plaintiff's claim, and did not entitle the defendant to a continuance. *Tipton v. Cummins*, *supra*.

The demurrer to the first count was properly overruled. The objection taken is, that the pleader, after describing the note, did not, as in the old forms, repeat that the defendant *thereby* promised to pay, &c. The count states that "the defendant, by his certain note in writing, then due and payable, promised to pay the plaintiff," &c. If that is true, which the demurrer admits, we think the plaintiff was entitled to his action.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

O. P. Morton and *M. Wilson*, for the appellant.

J. B. Julian, for the appellee.

THE NEW CASTLE AND RICHMOND RAILROAD COMPANY v.
CHAMBERS and Wife.

It was held that a new trial should have been granted to the appellants in the Court below, under the special circumstances shown by an affidavit made in

support of their motion, the statements in the affidavit not having been controverted by the adverse party.
 The truth of facts alleged in an affidavit in support of a motion for a new trial, may be controverted by the adverse party.

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Thursday,
 June 7.

APPEAL from the *Cass* Circuit Court.

GOOKINS, J.—*Chambers* and wife, who were the plaintiffs below, claimed damages against the appellants for constructing their road through the plaintiffs' lands. Appraisers were appointed, pursuant to the statute, who assessed the damages at 500 dollars, from which assessment the railroad company appealed to the Circuit Court, where there was a trial and verdict for the plaintiffs for 888 dollars and 88 cents. Motion for a new trial overruled, and judgment. The railroad company appeals.

In support of the motion for a new trial the appellants read the affidavit of *Williamson Wright*.

The affidavit states that "he is director of the *Newcastle and Richmond Railroad Company*, which is now changed under the law of *Indiana* to the name of the *Cincinnati, Logansport and Chicago Railroad Company*; that he is the general agent and superintendent of the line of road north of *Madison* county, and, as such, had full power and authority to employ counsel and manage and control the officers of said company. That under such authority he, with *Cyrus Taber*, a heavy stockholder in said road, called upon Mr. *Daniel D. Pratt*, an attorney, to retain generally his services as attorney for the company, and at such interview it was agreed by and between the parties, as defendant understood, by your affiant, that said *Pratt* was retained and employed as the attorney of the *Newcastle and Richmond Railroad Company* in all cases then pending, except one of one *Henry H. Helm*, in which he was personally employed, and in all cases that might in future arise in which the company was a party; and was to be paid such reasonable fees as might be demanded for such services. That said *Wright* relied upon said employment, and supposed that said *Pratt* was the counsel in said cause, and called upon *Stephen Taber*, a partner of said *Daniel D. Pratt* in the practice of law, to have the wit-

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nesses subpoenaed, just before the sitting of the Court, and was then informed that Mr. *Pratt* was employed for *Thomas Chambers*, as counsel in his cause. That your affiant called upon Mr. *Pratt*, and found he considered himself as employed by said *Chambers* before his employment by the company. That this was on the first day of the present term of this Court, and your affiant's urgent business required his immediate presence in *Cincinnati*, connected with the road. That he called upon *Daniel D. Pratt*, and told him of his reliance upon him for his legal services, and the inability to have another attorney employed and facts and defence made known, as your affiant's immediate presence was required in *Cincinnati*. That said *Pratt* agreed to continue the case over to the latter part of the second week, and your affiant left expecting to return and in person attend to said suit, as your said affiant understood from said *Pratt* that the said cause should be continued to the third week, if the business should keep the Court so long in session, and your affiant should not return. That your affiant employed no one, nor did any authorized agent employ an attorney, to appear in said cause, in the *Cass* Circuit Court. That said *Wright* is informed that said *Pratt* persuaded one *Henry Swift* to appear in said cause, representing to said *Swift* that said *Pratt* would dismiss said cause, and said *Wright* would be defaulted for not attending to said suit, and advised him, as a friend, to attend to said cause; that said *Swift* was not advised of the defence or the witnesses for the defence. That great injustice will be done said company if a new trial is not granted in this cause. That the party expects to show that the benefits arising from the construction of the road equal all the damages, or are within a small sum of the amount. That they can prove that said *Chambers* has been paid for fencing the road, which, as your affiant is informed, was included in the damages assessed in said cause, and he further states that said testimony, as your affiant is informed was given upon the trial of said cause, could be in part explained and in part rebutted, if an opportunity could have been had by

your affiant. No other action was or would have been taken, than to have had the appeal dismissed if your affiant was not present to attend trial." May Term,
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It seems to us that the facts stated in the affidavit ought to have entitled the defendants to a new trial. It is suggested by the counsel for the appellees that *Swift*, who appeared for the defendants below, was a practising attorney, a brother-in-law to *Wright* and a member of his family, and an employee of the company; and that the suggestion of the plaintiff's counsel to *Swift* to look after the interests of the company was prompted by courtesy to Mr. *Wright*. We can not judicially take notice of the matters here suggested, as they do not appear in the record; but if they did appear, still the defendants were prejudiced by the unauthorized interference of *Swift*, and that is the controlling feature in the case.

It is insisted that the remedy of the company was against *Swift*, who is not shown to be insolvent. Had the motion for a new trial not been made before judgment, and if his interference had been wholly upon his own motion, and without any suggestion from the opposite party, the position assumed would be entitled to more consideration; though we can not say that even then it would have been their only remedy. *Kent*, C. J., in *Denton v. Noyes*, 6 Johns. R. 296, plainly intimates that he would go further. In that case the judgment was retained, lest the plaintiff should be prejudiced by the loss of his lien, in consequence of a misplaced confidence in the attorney who appeared, and whom he supposed to have authority; but the defendant was let in to make his defence. The same course was directed by this Court, in the case of *Pierson v. Holman*, 5 Blackf. 482.

The facts stated in the affidavit are not controverted as they might have been, if untrue, and we think that under the particular circumstances of the case a new trial should have been granted.

As the motion for a new trial was made before judgment, the case is to be distinguished from those in which a judgment already rendered has been ordered to stand as

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HEDDY
v.
DRIVER.

Per Curiam.—The judgment is reversed. Cause remanded, with instructions to the Circuit Court to grant the defendant a new trial, upon the payment by him of all the costs in the action.

H. P. Biddle, for the appellants.

D. D. Pratt and *S. C. Taber*, for the appellees.

HEDDY and Others v. DRIVER.

A count which is not a nullity should not be rejected on motion. The plaintiff can not assign for error the dismissal of his suit, unless he excepted to the dismissal in the Court below.

Thursday,
June 7.

ERROR to the *Sullivan* Circuit Court.

STUART, J.—Action on the case against *Jane Driver*, as tenant in dower, for waste. The plaintiffs are the heirs at law of *Edwin Driver*, deceased. The defendant is his widow.

The declaration contained three counts. After trial, and verdict for 40 dollars, the Court sustained a motion for a new trial, and the cause was continued. At the next term, *Jane* had leave to withdraw her plea. She then filed a general demurrer to the declaration, which was sustained. The plaintiffs withdrew their joinder, non-prossed all the counts but the last, and the cause was continued with leave to amend.

At the following term, no amendment to the declaration having in the meantime been made, the defendant moved to dismiss the cause, for want of a declaration, and the Court sustained the motion.

The third count was not good on demurrer, but it could not be regarded as a nullity and rejected on motion. That

count stood on the record, not only with all its own allegations, but with all the formal parts of the entire declaration, and also with all the descriptive references made in it to the other counts which had been non-prossed.

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Instead of moving to reject, the defendant should have refiled her demurrer. *Port v. Williams, ante*, p. 219.

But as the plaintiffs did not appear as objecting in the Court below, and took no exception there to the opinion of the Court in dismissing the cause, the error can not be noticed in this Court.

Per Curiam.—The judgment is affirmed with costs.

J. P. Usher, for the plaintiff.

AMBROSE v. THE STATE.

The provisions of section 8 of the act of 1848 "to reduce the law incorporating the city of *Madison*, and the several acts amendatory thereto, into one act," &c., so far as they relate to the licensing of persons to retail spirituous liquors, did not repeal, by implication, within the corporate limits of said city, the general provision in the R. S. 1843 upon the subject.

A party can not be punished twice for the same act, under the same jurisdiction; but he may under different jurisdictions; as for an act in violation of the charter of a city and a penal law of the state.

ERROR to the *Jefferson* Circuit Court.

Thursday,
June 7.

STUART, J.—Indictment for retailing without license, found under the R. S. 1843. The record shows the act complained of to have been done in the city of *Madison*, under a license from that city.

The city of *Madison* granted the license, under an act passed subsequent to the R. S. 1843. Local Laws 1848, p. 92. And it is insisted that the latter act, so far as the corporate limits of the city were concerned, controlled the former act.

We can not carry repeal by implication that far. "Fixing rates and granting a license by the city excuses from

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liability to the city ordinances, but can not excuse from liability to the penal laws of the state." *Sloan v. The State*, 8 Blackf. 361. This position, say the Court, is the correct one. And the language quoted is used of a subsequent local act, giving the *exclusive* right to license the retailing of spirituous liquor to the city of *Richmond*, any law or custom to the contrary notwithstanding.

This is a far stronger case than is made upon the charter of the city of *Madison*.

It is urged that it would be subjecting the party to be punished twice for the same offence. But that is not warranted. It is not pretended that a party can be twice punished under the same jurisdiction. But that the same act may be an offence against two different jurisdictions is no longer an open question. *Fox v. The State of Ohio*, 5 How. 410.—*Moore v. The People of Illinois*, 14 id. 13.—*The State v. Moore*, at the present term. 434

We are clear that the defendant was properly convicted, notwithstanding his license from the city of *Madison*.

Per Curiam.—The judgment is affirmed with costs.

J. W. Chapman and *J. B. Merriwether*, for the plaintiff.

ROBESON and Another v. CHAPMAN and Another.

When a man is known to be contracting merely as the agent of another, who is also known as the principal, his contracts, if he possesses full authority for the purpose, will be deemed the contracts of the principal only.

Thursday,
June 7.

APPEAL from the *Franklin* Circuit Court.

DAVISON, J.—The complaint alleges that *Robeson* and *Burton* were indebted to the appellees 400 dollars for corn sold and delivered. The answer denies the indebtedness, and also sets up payment in full for the corn. Verdict for the plaintiffs below. New trial refused, and judgment on the verdict.

From the evidence it appears that *Cloud* and *Dare* authorized the appellants, who were the defendants below, to act as their agents in the purchase of corn. The authority was in writing, and reads thus:

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"*Brookville, December 10, 1852. Cloud and Dare* have this day employed *Robeson* and *Burton* as their agents to purchase corn, wheat and other grain, such as they want, for which they agree to pay said *Robeson* and *Burton* two cents per bushel for all grain which they purchase for them. All of the grain to be purchased under the direction of *Cloud* and *Dare*. [Signed] *Cloud and Dare*."

It was also shown that the purchase was made pursuant to the authority above stated, and was reduced to writing, the contract being as follows:

"Received of *Robeson* and *Burton* one dollar, in part payment for 1,000 bushels of corn, to be delivered at the pens on Mr. *Rayburn's* farm, which we have this day sold them for *Cloud* and *Dare*, at 35 cents per bushel; corn to be taken away within two weeks. We agree to let them have all we have to spare at the same price; all of which is to be paid for on or before the 1st of *January, 1853*. [Signed] *Alexander Chapman, John Whitsler*."

It was proved that *Cloud* and *Dare*, at the time this instrument was given, were known to the appellees, who were then distinctly told that the purchase was made for that firm. It was further shown that *Cloud* and *Dare*, a few days afterwards, fully recognized the sale of the corn, as made to them through their agents.

We think the verdict does not accord with the weight of evidence. The rule is, that "when a man is known to be contracting merely as the agent of another, who is also known as the principal, his contracts, if he possesses full authority for the purpose, will be deemed the contracts of the principal only." Story on Agency, s. 261. In the present case, it was clearly proved that the appellants, when they made the contract in question, were known to be agents; the names of their principals were also disclosed; and the appellees, on at least one occasion after the contract, recognized *Cloud* and *Dare* to be entitled to the corn

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under the purchase. There is, indeed, nothing in the evidence or circumstances leading to the conclusion that the appellants incurred or intended to incur, either expressly or impliedly, any personal responsibility in the transaction.

We are of opinion that a new trial should have been granted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. D. Howland, for the appellants.

G. Holland, for the appellee.

THE BOARD OF COMMISSIONERS OF LA GRANGE COUNTY
V. CUTLER.

Where statutes passed at the same session of the legislature, though apparently conflicting, are not directly repugnant, they should be construed *pari materia* as one statute, and so as to carry out what appears to have been the main intent of the legislature.

A local act approved *January 16, 1849*, provided, that the auditor of *La Grange* county should receive 700 dollars *per annum*, which should be a full compensation for all services which he might perform as such officer. It also provided that it should be his duty, on the first *Mondays* in *March* and *September* of each year, to make to the county board, in such form as it should direct, a return in writing, comprising all the fees and emoluments of said office, and all compensation for labor in any manner received by him in virtue of said office, for the half year ending at that time, which return should be verified, &c. It further provided that it should be the duty of the board to make half-yearly allowances to such auditor of such sum as would make his half-yearly salary equal to 350 dollars, to be paid out of the treasury of said county. The act "to increase and extend the benefits of common schools," approved *January 17, 1849*, after requiring county auditors to perform the several duties, &c., which, before that time, belonged to the office of school commissioner, provided that for the discharge of such duties, &c., they should be allowed by the county boards one-half of one per cent. upon the amount of school funds on loan in their respective counties.

Held, that said statutes should be construed thus: For services relative to the school fund, each county auditor should receive, as a compensation, one-half of one *per cent.* upon the amount of that fund on loan in his county; *provided*, that the auditor of *La Grange* county should not be allowed such *per centum* in addition to his fixed salary of 700 dollars.

APPEAL from the *La Grange* Circuit Court.

DAVISON, J.—This was a proceeding instituted by *Cutler*, the auditor of *La Grange* county, before the county board, to obtain an allowance in payment of his salary. The following is the cause of action :

“The county of *La Grange* to *Simon M. Cutler*, DR.
September, 1852. To salary as auditor from the 1st
of *March* to the 15th of *June*, being three months
and fifteen days, at \$700 per year \$201 16
Credit, by incidental fees during that time 7 55

\$193 61”

The board having heard the case, ordered that *Cutler*, the auditor, should receive out of the school funds 117 dollars and 14 cents, being the amount of one-half of one per cent. allowed for the management of that fund, from *March* 2, 1851, to *March* 2, 1852; and also that he be allowed 76 dollars and 47 cents out of the county treasury, &c. From this decision the auditor appealed. In the Circuit Court, the cause was submitted upon an agreed case. The Court rendered judgment in favor of *Cutler* for 117 dollars and 14 cents; and the county board appeals to this Court.

The validity of this judgment depends upon the construction to be given to an act of the legislature approved *January* 16, 1849, and to the 5th section of another act, entitled “an act to increase and extend the benefits of common schools,” approved *January* 17, 1849. The former is a local law, applicable to *La Grange* county, and provides, 1. That the auditor of said county shall receive 700 dollars *per annum*, which sum shall be a full compensation for all services which he may perform as such officer. 2. It shall be his duty, upon the first *Mondays* in *March* and *September*, in each year, to make to the county board, in such form as it shall direct, a return in writing, embracing all the fees and emoluments of said office, and all compensation for labor in any manner received by him in virtue of said office, for the half year ending at that time, which return shall be verified, &c. 3. It shall be the duty

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of said board to make half-yearly allowances to such auditor of such sum as will make his half-yearly salary equal to 350 dollars, to be paid out of the treasury of said county.

These provisions, it will be seen, fix the annual salary of the auditor of *La Grange* county, "for all services he may perform as such officer," at 700 dollars. But the act approved *January* 17th, after requiring county auditors to perform the several duties, &c., which, prior to that time, belonged to the office of school commissioner, provides, that for the discharge of such duties, &c., they shall be allowed by the county board one-half of one per cent. upon the amount of school funds on loan in their respective counties. Acts of 1849, pp. 69, 125.

This *per centum*, it is insisted, rightfully belonged to *Cutler*, in addition to the salary provided by the local statute; and such was the decision of the Circuit Court. If this construction be the true one, that statute can not be carried into effect in accordance with its manifest intent; because it expressly enacts that 700 dollars *per annum* shall be in full for all services the auditor, as such officer, may perform. Nor would the county board be able to settle the half-yearly salary of 350 dollars, because, in the performance of that duty, they are bound to take into consideration "all the compensation for labor in any manner received by him in virtue of his office for such half year."

Between the above statutes, there is no direct inconsistency, though it may be said there is an apparent conflict. They relate to the same subject, viz., an allowance to the auditor for his services, and were passed at the same session of the legislature. This being the case, the rule of construction is well settled. It becomes the duty of the Court to regard these enactments in *pari materia*, to consider them as one statute, and give them such an exposition as will sustain what appears to have been the main intent of the law-maker. In this case, the language of the local act relative to the salary and the mode in which it is to be paid, is too plain to afford any room for interpretation. It was, no doubt, a special favor conceded to the people of *La Grange* county, to have the compensation

of their auditor regulated on the basis of a fixed salary; and we are not permitted to indulge the conclusion that the legislature, at the same session, had intended to revoke such conceded favor, unless their intent to do so appeared manifest.

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From this view, the intention evinced in the statutes under consideration, when taken together, may be stated thus: For services relative to the school fund, each county auditor shall receive as a compensation one-half of one per cent. upon the amount of that fund on loan in his county; *provided*, the auditor of the county of *La Grange* shall not be allowed such per centum in addition to his fixed salary of 700 dollars. This construction, in our opinion, is fully sustained by authority. *McCartee v. The Orphan Asylum Society*, 9 Cowen 437.—*Dodge v. Gridley*, 10 Ohio 173.—*The State v. Rackley*, 2 Blackf. 249.—*McMahon v. The Cincinnati and Chicago Short-Line Railroad Company*, 5 Ind. R. 413.

The judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. L. Worden, for the appellants.

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COMESYS and Others v. THE STATE BANK OF INDIANA and Others.

Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled, as a general rule, to the benefit of all securities which have been taken by any one of them to indemnify him against such liabilities.

Where one of several accommodation parties to a bill who have taken a mortgage from their principal by way of indemnity, discharges a prior mortgage upon the land, he is entitled, upon the foreclosure of the mortgage executed to him and his co-sureties, to be allowed for the amount actually paid by him to discharge the prior lien.

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Where one of several accommodation parties to a bill has procured a mortgage from the principal to indemnify them, he is entitled upon the foreclosure thereof to be allowed a reasonable sum for his trouble and expense in procuring it; but nothing for attorneys' fees in defending suits against him as a party to the bill.

ERROR to the *Marion* Circuit Court.

PERKINS, J.—Bill in chancery to foreclose mortgages.
Decree of foreclosure.

The bill was filed by the state bank and *Isaac Dunn* against *Cornelius G. W. Comegys*, *Enoch D. John*, *Noah Noble John*, and others. The record of the case is voluminous, and presents several questions. Brevity will be consulted by stating and deciding them separately. The controversy in the case is between *Isaac Dunn* and *Comegys*, the only solvent parties liable upon two bills of exchange, which are set out in the record, in these words:

"Exchange for \$4,500. *Lawrenceburgh, December 2, 1841.* Four months after the date of this first of exchange, second unpaid, pay to the order of *Wymond and Ferris*, at the *Merchants' Bank of New-Orleans*, forty-five hundred dollars, value received, and charge the same to account. *Isaac Dunn.* To *N. N. John, New-Orleans.*"

This bill was accepted by *N. N. John*, and was indorsed by *Wymond and Ferris*, *E. D. John*, *A. P. Hubbs*, *John* and *Comegys*, a firm composed of *E. D. John* and *Cornelius G. W. Comegys*. The indorsement was to *Beverly Chew*, esq., cashier, or order.

"Exchange for \$4,000. *Cincinnati, November 23, 1841.* Four months after date of this first of exchange of this tenor and date, second unpaid, pay to the order of *E. D. John*, at the *Citizens' Bank of New-Orleans*, four thousand dollars, for value received, and place to account of yours, &c., *John* and *Comegys*. To *N. N. John, esq., New-Orleans.*"

This bill was accepted by *N. N. John*, and indorsed by *E. D. John*, *Isaac Dunn* and *A. J. Wheeler*. The indorsement is to *J. B. Perrault*, cashier, or order.

A question is made as to the relation existing between the several parties upon these bills. This question is to be resolved by the evidence in the cause; and we think

it satisfactorily establishes that they were drawn for the benefit of *Noah Noble John*, and that all the others were accommodation parties.

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As to the bill for 4,500 dollars, *B. F. Morris*, the president of the *Indianapolis* branch bank, says: "At the date of the bill, I was in *Cincinnati, Ohio*, and was applied to by *Enoch D. John*, one of the firm of *John and Comegys*, to purchase the above-described bill. He stated that the money was for the use of *Noah N. John*, who had purchased a quantity of flour of *John and Comegys*, to ship to *New-Orleans*. The bill, when first presented to me, was indorsed only by *Wymond* and *Ferris* and *Enoch D. John*. Having under my control, and in my possession, some funds belonging to the branch at *Indianapolis* of the state bank of *Indiana*, I agreed to negotiate the bill for and on account of said branch, if the indorsement of *A. P. Hubbs* and *John and Comegys* were added. *Enoch D. John* agreed to add their indorsements, and left *Cincinnati* to go to *Lawrenceburgh*, as he said, for the purpose of procuring the indorsements; and it was agreed between us that if *Noah N. John* brought the bill to me the next morning, with the additional indorsements, I would purchase it and pay him the money. The next morning *Noah N. John* called on me in *Cincinnati*, with the bill indorsed as I desired, and I paid him the money and received the bill."

As to the bill for 4,000 dollars, it is conceded by *Isaac Dunn*, one of the indorsers and a plaintiff in this bill, now seeking to exclude *Comegys* from the benefit of the mortgages in question, in a letter written by him to the *Franklin* bank of *Cincinnati*, the then holder of the bill, that *Comegys* was but an accommodation party; and *N. N. John*, in his deposition, says: "The bill for 4,000 dollars, in the bill in chancery mentioned, was drawn by *C. G. W. Comegys*, in the name of the firm, for my accommodation. The bill for 4,500 dollars was indorsed by *Enoch D. John*, in the name of the firm of *John and Comegys*, for my accommodation."

Other evidence confirms the truth of this statement. It is true, that *N. N. John* wished to use the proceeds of

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the bills in the purchase of flour from *John* and *Comegys*, millers, and that he was the son of *E. D. John*, one of said firm; but it appears that it was no object for *John* and *Comegys* to sell to him; that they had other offers for their flour at the same price that *N. N. John* was to pay; and that he had the preference simply on account of his relationship to one of the firm.

We are satisfied from the whole case that the proceeds of the bills went to *N. N. John*, and that, as between the parties to them, he was the real debtor, and should have paid them. This disposes of the first question.

Said *N. N. John* did not pay the bills. He sold the flour purchased with them in *New-Orleans*, where his father, *E. D. John*, then was, received the proceeds of the sale, and, instead of applying them, as was expected, in payment of said bills, he placed a part of them in the hands of his father, said *E. D. John*, who immediately left for *Texas*, taking the money with him. *N. N. John* expressly asserts that he left the money with his father, as his individual agent, and not in his character as a member of the firm of *John* and *Comegys*, and that *Comegys* received no benefit from the act. The remaining portion did not pay the bills.

Afterwards the complainant, *Isaac Dunn*, procured said *E. D. John*, then in *Texas*, to execute two mortgages to *Noah N. John*, whose money said *E. D. John* had fled with, dated *March* 11, 1842, upon certain parcels of land in *Hendricks* and *Marion* counties, *Indiana*, conditioned that said *Enoch* should cause to be paid to said *Noah N. John* the two bills of exchange herein before copied, or should exonerate said *Noah* and all others on the bills from liability, or that, on his failure to do so, the mortgaged premises should be sold for the benefit of all the parties concerned.

Said *Noah*, the real debtor, as we have seen, in those bills, having subsequently become a certified bankrupt, assigned said mortgages severally in the following words:

"I having been released from my liability for the payment of said bills of exchange which the within mortgage was given to secure (by the operation of the bankrupt law,) I therefore hereby transfer all my right, title, interest,

and demand of and to the within mentioned premises, to *Isaac Dunn*, and the other indorsers, drawers, &c., therein named, and for the purpose therein expressed and contained, which is the application of the proceeds of said lands, as far as it will go, to the payment of said bills of exchange. Given," &c., "this 31st day of *July*, 1843. *N. N. John*, [SEAL.] Attest: *W. C. Layton*."

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These are the mortgages being foreclosed; and a question is made as to who has the beneficial interest in them.

The mortgages, assigned as above, were delivered to complainant *Dunn*, as he says, to secure him, in the first place, and, in the next place, to secure others concerned; but the assertion is in direct conflict with the terms of the mortgages and assignments, and with what is laid down by *Story* in the first volume of his *Equity Jurisprudence*, p. 555, as a general principle of equity, viz., that "sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal; but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities." The application of this principle may be, in some cases, controlled and limited by special circumstances, but in the case before us, the very provisions of the mortgages and assignments require its adoption in its broadest extent.

Combegys had a right to share equally with *Dunn* in the benefit of the mortgage securities. So far upon the second question.

The lands embraced in the mortgages in question were covered by a previous mortgage to the state, which was payable in state bonds at par, though the bonds were purchasable in market at a great discount. The mortgage to the state was paid off, as complainant *Dunn* claims, by him, and he seeks to be subrogated to the rights of the state and reimbursed the full amount. He is entitled to be allowed the amount actually paid by him in cash for the bonds, with interest, and no more.

A question of fact is made as to certain of the bonds used in paying off the mortgage to the state, whether they

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were purchased by *Dunn* or *Comegys* for that purpose. *Comegys* furnished the disputed bonds to *Dunn* to hand over to the state, *Comegys* says, as a payment on his part upon the mortgage, but *Dunn* says as a payment to him of notes he held on *Comegys*, whereby the bonds became his, and should go to his credit in the account as to the payment of the state's claim. These notes, it appears, were not given up, though the bonds amounted to more than the notes; nor was the overplus paid to *Comegys*. We see no facts in the case tending to prove that the bonds were given by *Comegys* to *Dunn* in payment of notes held by the latter.

We proceed to the fourth question.

Among the claims insisted on by *Dunn* as having priority of payment out of the mortgaged premises, is one for trouble and expense in procuring the mortgages from *E. D. John*, which, so far as was reasonable, would be properly allowed; and also one for a large amount for attorneys' fees in, we suppose, defending a suit against him as surety on one of the bills of exchange in question, though the specification is vague. We see nothing else for which the fees could have been paid. He would not be entitled to be allowed such fees.

Having now considered most of the questions raised, and stated facts sufficient to make them understood, we proceed to notice the institution and particular objects of, and decree in, this suit.

The two bills of exchange mentioned, were not, as we have stated, paid by *N. N. John*. The bill for 4,000 dollars was paid by *Comegys* and *Dunn* in equal proportions—2,000 dollars each. The bill for 4,500 dollars has not been paid, but is held by the *Indianapolis* branch of the state bank of *Indiana*, which, under an arrangement with *Dunn*, is, jointly with him, foreclosing the mortgages given by *E. D.* to *N. N. John*, and by the latter assigned to *Dunn* for the benefit of the parties to the bills of exchange; and the struggle is between *Dunn* and *Comegys*, as we have seen, in regard to the application of the proceeds of the sale of the mortgaged premises. The bank, it is manifest,

should be first paid, as such payment will accrue to the benefit of both *Comegys* and *Dunn*, as indorsers of the bill held by the bank. But the overplus—is *Dunn* to be preferred in the distribution of that? It will appear, from what we have said, that he is not, except as to expenses paid, &c., in obtaining the mortgages for the benefit of both himself and *Comegys*, and the amount, if any, he may have paid beyond the amount paid by *Comegys* upon the mortgage to the state.

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In rendering the decree in the cause the Court below has not given the *data* upon which it proceeded; but it has, apparently, allowed *Dunn* for counsel fees, and excluded *Comegys* from reimbursement for money paid for state bonds to be applied on the state's mortgage, and for the 2,000 dollars paid on the 4,000 dollar bill of exchange. This was wrong as to the fees and the money paid for the bonds, and wrong as to that paid on the bill of exchange, unless, as is contended, *Comegys* had previously been refunded that sum. We are far from being satisfied by the evidence that such is the fact; and as the cause must be reversed, at all events, we add no more on this latter point, but direct that the parties have leave to amend pleadings or adduce further evidence in the cause, if they, or either of them, desire to do so, touching the question of distribution, but not to disturb sales of real estate made.

Per Curiam.—The decree is reversed with costs. Cause remanded for further proceedings not inconsistent with this opinion.

J. Morrison, S. Major and P. L. Spooner, for the plaintiffs.
O. H. Smith and S. Yandes, for the defendants.

VAN PELT v. CORWINE.

A motion for a new trial will not be entertained after a motion in arrest of judgment.

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A judgment will not be reversed on account of errors of the Court which were harmless.

A suit will lie for services rendered by an infant under an unfulfilled special contract.

APPEAL from the *Shelby* Circuit Court.

PERKINS, J.—Assumpsit by *Corwine* against *Van Pelt* for work and labor. Pleas, the general issue, payment, accord and satisfaction, and some others that need not be mentioned. The cause was tried by a jury, and there was a verdict, and judgment upon it, for a fraction over 100 dollars.

There was a motion made to arrest the judgment, and for a new trial.

A demurrer was sustained to certain pleas.

The work and labor were performed by the plaintiff for the defendant while a minor, and under a special contract not fulfilled.

The motion in arrest of judgment was an affirmance of the verdict upon the evidence, and we shall not, therefore, look into that. The motion for a new trial was too late to be noticed. *McKinney v. Springer*, at the present term.

The merits of the case were triable under the issues formed, and it is not of consequence to look into the correctness of the decisions on the demurrers. Error in those decisions could do no harm, and cases will not be reversed for harmless errors. *Cheek v. Glass*, 3 Ind. 286.

A suit can be maintained for the value of services rendered by an infant under a special contract not fulfilled. *Harney v. Owen*, 4 Blackf. 337, deciding the contrary, was expressly overruled in *Dallas v. Hollingsworth*, 3 Ind. 537.

The evidence not being before us, no question arises as to the parties to the suit.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

T. A. Hendricks and *M. M. Ray*, for the appellant.

S. Major, for the appellee.

HUFFORD v. THE STATE on the relation of WHITE.

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Debt on a guardian's bond, dated *February 13, 1833*. Breach, that the guardian had received large sums, &c., the property of his wards, which he had converted to his own use, of which the relator was entitled to a sixth; that he had not accounted therefor to the relator, nor to the Probate Court, and that he had left the state and gone to parts unknown, so that a demand could not be made of him; and that the relator was twenty-one years of age. Process was served on only one of the defendants, who was a surety. He answered in several paragraphs, as follows: 1. That the cause of action did not accrue within three years before the commencement of the suit. 2. That the guardian had not been called on to account. 3. That he had complied with all the orders of the Probate Court as guardian, &c. 4. That on the 13th of *February, 1844*, he rendered to the Probate Court a just and true account of his guardianship, in discharge of his trust. 5. That the relator had made no demand upon the guardian for an account and a settlement. *Held*, that demurrers to these several paragraphs were correctly sustained.

Facts alleged in a complaint, which are not denied by the answer, are regarded as admitted.

APPEAL from the *Hendricks* Court of Common Pleas.Friday,
June 8.

GOOKINS, J.—This was an action of debt, on the bond of one *West*, as guardian of the relator and five other children of *Thomas White*, deceased, dated *February 13, 1833*. Two breaches are assigned, alleging that *West* had received large sums of money, notes, &c., the property of his wards, which he had converted to his own use, of which the relator was entitled to one-sixth part; that he had not accounted therefor to the relator, nor to the Probate Court, and had left the state and gone to parts unknown, so that a demand could not be made upon him; and that the relator had attained the age of twenty-one years.

The process was served only on *Hufford*, who answered in seven paragraphs, as follows: 1. That the cause of action did not accrue within three years before the commencement of the suit. 2. That *West* had not been called on to account. 3. That he had complied with all the orders of the Probate Court as guardian, &c. 4. That on the 13th of *February, 1844*, *West* rendered to the Probate Court a just and true account of his guardianship, in dis-

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charge of his trust. 5. A denial that *West* received and converted said assets to his own use. 6. That the relator had made no demand upon *West* for an account and settlement. 7. A set-off against the relator in favor of *West*.

The plaintiff filed demurrers to the first, second, third, fourth and sixth paragraphs, and a reply in denial of the seventh. The demurrers were sustained, and this is assigned for error. The appellant has not pointed out any objection to the decision upon these demurrers, and we do not see any. The cause was submitted to the Court for trial. Verdict and judgment for the relator. Motion for a new trial overruled (1).

The record contains all the evidence.

At the *May* term, 1833, of the *Hendricks* Probate Court, *West* reported that he had received 30 dollars in money, and 122 dollars and 37½ cents in notes, belonging to his wards. On the 9th of *February*, 1836, he reported that he had received 153 dollars of the estate of *Thomas White*, deceased, which he had loaned out at six per cent. On the 13th of *August*, 1837, he recovered a judgment, as guardian, against one *Bray*, for 54 dollars and 87 cents. On the 11th of *March*, 1841, he acknowledged satisfaction of said judgment by 49 dollars paid to himself, and 15 dollars paid his attorney. This was all the evidence given on the trial.

The objections taken to this judgment are,—1. That the evidence does not sustain the finding of the Court, because it does not appear that the relator was one of the heirs of *Thomas White*, deceased; 2. That it is not shown what portion of the money received by *West* the relator was entitled to; and 3. That no demand of *West* was shown.

None of these objections are well taken. The relator alleges that he is one of the six heirs of *Thomas White*, and that he is entitled to one-sixth part of the amount received by *West*. These allegations are not denied; hence they need not have been proved. An excuse is shown for not having made a demand of *West*, because he had left

the state and gone to parts unknown. The question of the sufficiency of this excuse was raised by the demurrer, and was decided correctly. The excuse was sufficient. There was no denial of the fact of his having left the state; hence there was no occasion to prove it.

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Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

C. C. Nave, for the appellant.

(1) It has recently been held, in numerous cases tried under the R. S. 1843, that after a motion in arrest of judgment a motion for a new trial can not be entertained. *Rogers v. Maxwell*, 4 Ind. R. 243.—*Sherry v. Ewell*, id. 652.—*Smith v. Porter*, 5 id. 429.—*Hord v. The Corporation of Noblesville*, ante, p. 55.—*Van Pelt v. Corwine*, ante, p. 363.—*McKinney v. Springer*, post.

The R. S. 1852, however, contain the following provisions: "The application for a new trial must be made at the term the verdict or decision is rendered." 2 R. S., p. 119, s. 354. "Where causes for a new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by a complaint filed with the clerk, not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the Court, upon the evidence produced by the parties. But no such application shall be made more than one year after the final judgment was rendered." 2 R. S., p. 119, s. 356. As the motion for a new trial may now be entertained after final judgment, it would probably be held that a motion in arrest would not operate as a waiver of the former motion; for it is difficult to perceive how a motion in arrest would affirm the verdict any more than allowing judgment to be rendered without objection.

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A judgment having been rendered by a justice of the peace for the plaintiff, the defendant brought the proceedings before the Circuit Court by *certiorari*, and the judgment having been reversed, the Circuit Court tried the cause, and reduced the plaintiff's judgment more than 5 dollars. *Held*, under the R. S. 1843, that the defendant was entitled to judgment for the costs before the justice and in the Circuit Court.

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June 8.

APPEAL from the *Grant* Circuit Court.

GOOKINS, J.—*Chance* obtained a judgment against *Halley*, before a justice of the peace, for 75 dollars. *Halley* brought the proceedings into the Circuit Court by a writ of *certiorari*, and upon errors in law assigned, the judgment of the justice was reversed, at the costs of *Chance*. The Circuit Court retained the cause for trial, which finally resulted in a verdict and judgment for the plaintiff for 63 dollars and 48 cents, upon which the Circuit Court gave judgment in favor of the defendant for costs. The incorrectness of this judgment for costs is the only error assigned.

The statute of 1843, p. 895, s. 198, provides that if, on *certiorari*, the judgment of the justice be reversed, the Court shall render judgment of reversal, and for the costs that have accrued up to that time in the Circuit Court, in favor of the plaintiffs in the *certiorari*, but the cause shall be retained by the Court for trial and final judgment, as in cases of appeal.

The same question, in substance, was before this Court, in the case of *The Centreville and Abington Turnpike Co. v. Jarrett*, 4 Ind. R. 213, which was an appeal from an award of arbitrators appointed to assess damages. The act, in that case, authorized the appeal "according to the same rules that prevail in cases taken from justices' judgments." In that case, the amount recovered on the appeal having been reduced more than 5 dollars, it was held that the defendant was entitled to costs, such being the statute regulating appeals. In the case under consideration, the language does not differ materially from that used in the case above cited.

The appellant insists, that having been subjected to the costs of the judgment of reversal, that is the penalty provided for having taken an erroneous judgment before the justice; that the parties then stood upon an equality, and if he finally obtained judgment, he was entitled to costs. The same might be said where a party was permitted to amend his pleadings, on appeal, upon the payment of costs. Though the party against whom judgment had been given

below should, by his amendment, bring in the very matter which should occasion the reduction, the consequence of such reduction would follow nevertheless. This case can not be distinguished in principle from that above quoted, and the judgment of the Circuit Court must be affirmed.

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Per Curiam.—The judgment is affirmed with costs.

J. Brownlee, for the appellant.

I. Van Devanter, for the appellee.

STOUT and Others v. MORGAN.

A., as administrator of *B.*, filed his account for a final settlement, which contained an item, on the credit side, of an account of one *C.* paid, &c. The item was supported by the account, verified by the oath of *C.*, and his receipt to the administrator on the back thereof. The heirs of *B.* objected to this item, and, having appeared, they and the administrator, by agreement, submitted the validity of the credit to the Court. One of the heirs having, as the record stated, "released his interest," was offered as a witness and excluded. The trial was had under the R. S. 1843.

Held, that the burden of proof was on the heirs.

Held, also, that the release, even had it been of the interest of the witness as to the item in question, would not have rendered him competent.

Where the record states that a witness released his interest, but does not state to whom, or how far it extended, and the Court below has held it insufficient, it will be so regarded in the Supreme Court.

If the party on whom lies the burden of the issue offers no evidence, the adverse party is entitled to a judgment.

Even though the admission of evidence was erroneous, yet if the judgment is right notwithstanding, it will not be reversed.

APPEAL from the *Marion* Court of Common Pleas.

Friday,
June 8.

STUART, J.—*Morgan*, as administrator of *James Stout*, deceased, filed his account for final settlement, &c. Among the items was the account of *C. Moore* for 28 dollars, verified by the claimant, in accordance with the statute. R. S. 1843, p. 524. The administrator had paid it and taken *Moore's* receipt on the back; and thus it was filed as a voucher. To this account of *Moore's* alone, *Stout's* heirs

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objected. The heirs and *Morgan* appeared, and, by agreement, the issue joined was submitted to the Court, and judgment was rendered in favor of the administrator, allowing the claim as correct. *Stout's* heirs appeal.

In this Court only two errors are assigned. The one is the admission of *Moore's* evidence; the other the rejection of *Stout's*.

Perhaps the first thing to be settled is, on whom lies the burden of the issue submitted to the Court? Very clearly upon the heirs of *Stout*. It was for them to show that *Moore's* claim was improperly or fraudulently allowed and paid by *Morgan*. Having shown by the voucher of *Moore* that he had acted in conformity to the statute, (R. S. 1843, p. 524, s. 206,) the presumption arises that the administrator had done his duty, until the contrary is shown.

Now as to the errors; and, first, as to the rejection of the evidence. *Edward Stout* "released his interest," and was offered as a witness by the other heirs. But the Court, on objection being made, decided that the witness was not competent; correctly, too, we think. For even if he did release as to that claim, he was yet clearly interested as a distributee of the estate; or if there were lands, and the personalty were insufficient, the debts must be paid out of such realty. He was, therefore, interested in defeating this claim. And as the record does not disclose what sort of release it was, to whom made, or how far it extended, and the Court has decided it insufficient, we are bound to presume in favor of the action of the Court.

Further, the record does not purport to contain all the evidence. And as the burden of the issue was on the heirs, and they do not appear to have offered any evidence, *Morgan* was entitled to a judgment on the record as it is here presented, independent of *Moore's* evidence. So that it is not necessary to examine as to the interest of *Moore*. For if the admission of his evidence was erroneous, yet the judgment being right independent of it, would not be reversed. We think the judgment of the Common Pleas should be sustained.

Per Curiam.—The judgment is affirmed with costs.
N. B. Taylor and *J. Coburn*, for the appellants.
L. Barbour and *A. G. Porter*, for the appellee.

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 v.
 FRY.

6	371
135	89
6	371
143	387
6	371
169	698

MURRAY v. FRY.

When the evidence is not in the record, if, upon any probable state of facts, the instructions of the Court would be correct, the existence of such facts will be presumed in support of the judgment; but if the instructions would be wrong, on every state of facts, and were calculated to direct the jury to an improper basis for their finding, they will be presumed to have misled the jury.

Assumpsit by an infant upon a special contract, whereby she agreed to work for the defendant for a term specified, and he agreed to furnish her board, clothing, &c., and also to furnish her a cow, a bed, &c., in consideration of such service. Averment, that the plaintiff faithfully performed her part of the contract, but that the defendant wholly failed to board and clothe her properly, or to deliver the articles of property or any of them. There was also a common count for work and labor. The evidence did not appear in the record. The Court instructed the jury that they should take into consideration the value of such a home as the plaintiff had enjoyed, &c.; her opportunity of acquiring instruction from the defendant's wife in matters of housekeeping; and the advantages resulting to her from a residence in a respectable family. *Held*, that these instructions were wrong.

An appeal was taken from the judgment of a justice of the peace to the Circuit Court, in which the defendant made a material amendment of his defence. The plaintiff was an infant, and her next friend being unwilling to continue liable for the costs, was discharged, and she was allowed to prosecute, by another, as a poor person. The judgment was reduced in the Circuit Court more than 5 dollars. The costs of the suit up to the time of the discharge of the first next friend, including the costs of said amendment, were taxed against him. *Held*, under the R. S. 1843, that this was wrong.

ERROR to the *Hamilton* Circuit Court.

STUART, J.—*Sarah Murray*, an infant, by her next friend, *Bronson*, sued *Fry* in assumpsit. The declaration sets out a special contract between *Sarah* and *Fry*, to the effect that she was to work in the family of *Fry* until she was eighteen years old, being about two years from *March* 1,

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1846; that *Fry*, on his part, agreed to furnish *Sarak* board, clothing, &c., and, at the end of the term, to furnish her a cow of the value of 12 dollars, a bed of the value of 20 dollars, and other household furniture of the value of 50 dollars, in consideration of her work and labor, &c. She then avers that she faithfully performed her part of the contract, but that *Fry* wholly failed to board and clothe her properly, or to deliver the articles of property, or any of them. There is a common count for work and labor; and the whole amount of damages claimed is 100 dollars. The cause was commenced before a magistrate. Verdict and judgment for 36 dollars and 12½ cents. *Fry* appealed to the Circuit Court.

On her affidavit that *Bronson* was not willing to act longer as her next friend, and petition for the appointment of a substitute, and that she be permitted to prosecute as a poor person, she was allowed by the Court so to prosecute, and *Garver* was substituted for *Bronson* as her next friend.

The defendant, *Fry*, was permitted to make a material amendment to his defence, at his costs, "which," says the order, "is hereafter to be fixed as to the amount thereof." The cause was continued till the next term.

At the next term there was a jury trial. Verdict and judgment for Miss *Murray* for 2 dollars and 20 cents. The Court adjudged the costs up to the time of his discharge against *Bronson*, amounting to 34 dollars.

The evidence is not in the record, but a bill of exceptions gives the charge of the Court to the jury.

The substance of the charge is, that the plaintiff was entitled to recover what her services were reasonably worth; that the defendant, *Fry*, was to be allowed for such clothing, schooling, and medical attendance as were sustained by the evidence; and that the jury should take into consideration the value of such a home for nearly three years as the plaintiff had enjoyed in the house of the defendant; her opportunity of acquiring instruction of defendant's wife in matters of housekeeping; and the advantages resulting to her from a residence in a respectable family, &c.

When the evidence is not in the record, the Court will go a great way to sustain the judgment of the Circuit Court. If, upon any probable state of facts, the instructions complained of would be correct, the existence of such facts will be presumed. But if the instructions are in themselves radically wrong, under any state of facts, directing the minds of the jury to an improper basis on which to place their verdict, it would be hazardous to presume that the jury had, notwithstanding such erroneous instructions, arrived at a correct conclusion.

On the part of Miss *Murray*, the special contract was complete. When she had thus fulfilled and sued *Fry* for those articles, or their value, he could not set up the benefits which she had derived as mere incidents of the contract, in discharge of the specific duties which he had agreed to perform. His obligation consisted as well of the pleasant home, the board, the clothing, &c., which he had furnished, as of the other specified compensation which Miss *Murray* complains he failed and refused to furnish. She sued, in the first count, for what he failed to do. The instruction that the jury were to consider what had been performed under an entire contract, as in any respect a discharge of what remained to be done, was clearly erroneous.

Of the same character was that part of the instruction which directs the jury to consider the respectability of the *Fry* family. That respectability was a very proper matter for Miss *Murray's* consideration before she entered into the special agreement to work for *Fry*. It well might, and very probably did, form a strong inducement for her to enter *Fry's* service on terms favorable to him. In this way he already had enjoyed the full benefit of his respectability. But, in no event, could it be law that this imaginary condition, called "family respectability," should be estimated by the jury as in any degree a compensation for her services. Such as it was, Miss *Murray* was entitled to its benefits in addition, and as incident to, the more substantial stipulations of the contract. Clothed with the authority of the Court as law, its tendency was to mislead the jury. *Peyton v. Bowell*, 1 Blackf. 244.

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The order for costs against *Bronson* was also erroneous. *Fry's* amendment was material, and threw on him such costs up to the time of the amendment as the Court might direct. R. S. 1843, c. 47, s. 171. But the statute does not extend the judicial discretion to taxing such costs against the opposite party.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. H. Voss, for the plaintiff.

J. Robinson, for the defendant.

SMITH v. DOWNING.

Possession of a chattel, pursuant to a purchase, is *prima facie* evidence of title.

The levy of a distress warrant constitutes of itself a distraint.

If, under the R. S. 1843, a chattel was levied upon by a distress for rent, when no rent was due, the owner was entitled to recover from the distrainer double the value of the chattel, though he had regained the possession.

Action under s. 220, p. 830, R. S. 1843, to recover double the value of a distress.

Held, that the averment that no rent was due was of the substance of the declaration.

Held, also, that the burden of proving that averment was on the plaintiff.

Plenary proof of a negative averment is not, in such a case, necessary; it being sufficient to adduce such evidence, as, in the absence of counter evidence, affords ground for presuming the averment to be true.

In trover, for the unlawful seizure of goods, the fact that the plaintiff may have reclaimed them, does not go in bar of the action, but merely in mitigation of damages.

Trover, for the unlawful seizure of goods. It was proved on the trial that the goods had been restored to the owner, and it was not shown that the plaintiff had suffered any damages from the seizure. Judgment having been rendered for the defendant, *held*, that the plaintiff was not entitled to a new trial.

Friday,
June 8.

ERROR to the *Vigo* Circuit Court.

DAVISON, J.—Trespass on the case. The declaration contains three counts. The first charges that *Smith* was

the owner of one thousand bushels of corn worth 200 dollars, in certain pens situate on land in *Vigo* county, viz., the *south-east* quarter of section twenty-four, in township thirteen north, of range *nine* west; and that *Downing* distrained said corn for rent pretended to be due to him on said land, when in truth no rent was due. The second count varies from the first, in this only: it alleges that *Downing* took the corn from the land above described, by unlawful distress, for the rent due him on and for the south-east quarter of section twenty-four, township thirteen north, of range *seven* west, when, &c. These counts are founded on section 220, c. 45, R. S. 1843, which provides that, "the owner," &c., "of any property distrained for rent pretended to be due, when in truth no rent was due, may, by an action of trespass on the case, recover against the person so distraining, or his personal representatives, double the value of the goods so distrained." The third count is in trover for the corn. Plea, not guilty. The Court tried the cause and found for the defendant. New trial refused and judgment.

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V.
DOWNING.

One *Lindley*, it appeared, was the owner of a tract of land in said county, described as the *south-west* quarter of section twenty-four, in township thirteen north, of range *nine* west, which, for the year 1848, he had leased to one *Hill*. Within that year, the leased premises were sold on execution to *Downing*, the present defendant. In *April*, 1849, *Lindley* distrained the corn in dispute for the rent due from *Hill* for the year 1848. It was sold as a distress, and bought by one *Salmon Wright*, who afterwards sold it to *Smith*, the plaintiff. After this, in *June*, 1849, *Downing* filed his affidavit before a justice, alleging that *Hill* was indebted to him 300 dollars for the rent of the same land for the year 1848, and thereupon procured a distress warrant, which, on the 6th of *August*, 1849, was levied on said corn. This levy was made while *Smith* was in the act of hauling it away, and, on account of said levy, his wagons were stopped. There was some evidence tending to prove that a trial of the right of property, relative to the corn, was had between *Smith* and *Downing*, but how it resulted

May Term, 1855. is not shown. After the levy, *Smith*, in the language of a witness, "got the corn," which was at that time worth 200 dollars. It was proved that *Lindley* never surrendered possession of the land to *Downing*.

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v.
DOWNING.

When the distress warrant was levied, *Smith*, under a sale to himself, was in full possession of the corn. This was sufficient, *prima facie*, to establish his right of property. That he re-possessed it after the levy is not important, because the levy itself constituted a distraint. And if, at the time it was made, "no rent was in truth due," the plaintiff, under the first and second counts, was entitled to recover double the value of the goods distrained.

But the main point of inquiry is, does the evidence prove that no rent was due from *Hill* to the defendant? This was, no doubt, a material averment in the counts, without which they would have been defective in substance. And though that averment is negative in its character, still the plaintiff grounds his action upon it, and it being thus an essential element in his case, the burden of proof rested on him. 1 Greenl. Ev., s. 78.

It is true, plenary proof on the part of the plaintiff, in cases like the present, is not required. It has been "considered sufficient if he offer *such evidence* as, in the absence of counter testimony, would afford ground for presuming the allegation to be true." Has "such evidence" been adduced in the case before us? The Court below, sitting as a jury, seems to have answered this question negatively, and we are not prepared to say that its conclusion is not correct. There is nothing in the circumstance that the premises were never surrendered by *Lindley* to the defendant, inconsistent with his title to all the rent that accrued after he bought them at sheriff's sale. The record, in our opinion, contains no evidence that allows the inference that no rent was due from *Hill* to the defendant.

It remains to be inquired, whether the plaintiff was entitled to recover upon the count in trover? The evidence fully sustains his title to the corn. If it was seized and taken from his possession, the mere fact that he afterwards

"got the corn" would not defeat the action; it would only go in mitigation of damages; and the plaintiff, notwithstanding he had regained his property, would still have the right to recover damages commensurate with the injury suffered from such illegal seizure. *The Greenfield Bank v. Leavitt*, 17 Pick. 1.—*Higgins v. Whitney*, 24 Wend. 379. But the evidence, though all upon the record, was insufficient to have supported a recovery. The corn, it is true, was proved to have been worth 200 dollars; that, however, was restored to its owner; but it was not shown that the plaintiff incurred any amount of damage from the seizure of his property. Nor do the proofs furnish any data upon which damages, on that account, could have been estimated. *Conwell v. Emrie*, 4 Ind. R. 209.

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We perceive no sufficient reason in support of the motion for a new trial.

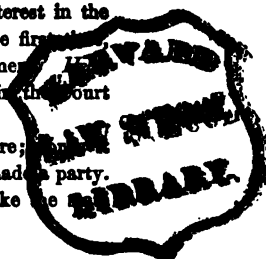
Per Curiam.—The judgment is affirmed with costs.

J. P. Usher, for the plaintiff.

PATTISON and Others v. SHAW.

A bill for foreclosure did not aver that the mortgagor had an interest in the premises capable of being mortgaged. It was objected for the first time on error, that the bill was defective for the want of this averment. That the objection, if available at all, should have been made in the court below, at the earliest stage of the proceedings.

A prior mortgagee is not a necessary party to a bill for foreclosure; and it is clear that a junior mortgagee is, though he may properly be made a party. There is no rule of practice which authorizes a plaintiff to make the mortgagee a defendant in a cause.



APPEAL from the *Fayette* Circuit Court.

Friday,
June 8.

DAVISON, J.—*Shaw*, on the 19th of *November*, 1852, filed a bill in equity, having for its object the foreclosure of a mortgage executed to him on the 9th of *June*, 1852, by one *Francis Conwell*. In *July* following, *Conwell* conveyed the

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SHAW.

mortgaged premises to *Pattison*, the appellant, subject to *Shaw's* incumbrance; it being stipulated as part of the consideration, in the deed of *Conwell*, that *Pattison* should pay *Shaw's* debt. The bill does not aver that *Conwell* had a mortgageable interest in the land. In other respects it is in the common form.

All the defendants except *Pattison* were defaulted. He answered and filed his cross-bill. No defence is set up by the answer; but in his bill he alleges that the premises, when deeded to him, were incumbered by a mortgage to the state of *Indiana*, which is duly recorded; and he prays that the state be made a defendant. The Court sustained a demurrer to the cross-bill, and rendered a decree of foreclosure.

The original bill, it is said, is defective, because it does not allege title in the mortgagor when he executed the mortgage. This objection was not raised in the Circuit Court; and we think it is one which, if available at all, should have been made at the earliest stage of the proceedings. It is evidently too late to make such objection in the first instance in this Court.

But was the state a necessary party? It is not shown whether her incumbrance was prior or subsequent to that of the appellee. If it was prior, the authorities seem to be decisive that she was not a necessary party, because her rights were paramount; nor is it clear that the complainant would have been positively required to make a subsequent mortgagee a party, though, at his election, he might have done so. Story's Eq. PL, s. 193, and notes. In the present case the answer is too indefinite to afford any data upon which to decide the point under consideration. Moreover, we know of no rule of practice that would authorize the state to be made a party defendant in any cause. The decree must be affirmed.

Per Curiam.—The decree is affirmed, with 2 per cent. damages and costs.

G. Holland, for the appellants.

J. D. Howland, for the appellee.

THE MADISON AND INDIANAPOLIS PLANK ROAD COMPANY
v. STEVENS.

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1855.

THE MADI-
SON AND
INDIANAPOLIS
PLANK ROAD
COMPANY
v.
STEVENS.

Parol evidence is not admissible to prove that a promise in writing, absolute on its face, was subject to a condition.

Friday,
June 8.

APPEAL from the *Decatur* Court of Common Pleas.

PERKINS, J.—Assumpsit by *The Madison and Indianapolis Plank Road Company* against *John F. Stevens*, upon the following instrument:

"We, the subscribers, do hereby bind ourselves to pay the amounts subscribed by us as stock in *The Madison and Napoleon* [now *Indianapolis*] *Turnpike Company*, to the treasurer of said company, as the call may be made by the board of directors of said company on us, without relief from stay or appraisal laws. *January 23, 1851.*

Names.
J. F. Stevens.

Shares.
8."

The shares were 25 dollars each.

The road in question had been completed to within two and a half miles of *Greensburg* from *Madison*, a distance of about fifty miles.

The defence set up is, that the stock sued on was subscribed for the purpose of completing the road to *Greensburg*, conditional upon such completion, not to be otherwise valid, and that the road has not been completed thus far, and is not progressing. The evidence tending to prove these facts was objected to, and should have been excluded. The written contract makes no conditions. *Railsback v. The Liberty and Abington Turnpike Co.*, 2 Ind. R. 656.—*The State v. Chrisman*, id. 126.

A good many questions were raised upon the pleadings; but what we have said disposes of all of them that are of any importance.

DAVISON, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Gavin and *J. R. Coverdill*, for the appellants.

B. W. Wilson, for the appellee.

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DAVIS
v.
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LAND.

Friday,
June 8.

FRANCIS and Another v. DUCKWORTH.

APPEAL from the *Marion* Circuit Court.

Per Curiam.—Bill in chancery to set aside a fraudulent conveyance. Decree below for the plaintiff. The case is upon the weight of evidence. We think the decree below was right upon that, and, hence, it must be affirmed with costs.

D. Wallace, E. Coburn and R. L. Walpole, for the appellants.

L. Barbour and A. G. Porter, for the appellee.

DAVIS and Another v. CUMBERLAND and Others.

A. executed a title-bond to B. conditioned for the conveyance of a town-lot upon full payment of the purchase-money. C. having loaned to B. money to complete the payment, received from him an assignment of the bond, by way of security, and afterwards received a deed from A. B. having erected buildings on the lot, the mechanics instituted legal proceedings to enforce their liens. C. was a party. The Court decreed that the property should be sold and the proceeds applied, first to the discharge of the debt to C., and next to the satisfaction of the mechanics' liens. B., after the decree and before the sale, assigned his interest in the lot to D., who bid off the property at a sum exceeding the amount of the decree, and the sheriff returned to D. the surplus. Before the assignment to D., E. and others having recovered judgments before a justice of the peace, filed transcripts thereof in the clerk's office to bind said real estate, and D. and the sheriff were notified of the fact before the sale. B. was insolvent.

Held, that the transcripts never became a lien upon the lot.

Held, also, that E. and others had no equitable claim upon said surplus.

Held, also, that the surplus was properly delivered by the sheriff to D.

Saturday,
June 9.

APPEAL from the *Montgomery* Circuit Court.

GOOKINS, J.—This action was brought by *Cumberland* and others against *Ramey*, the sheriff of *Montgomery* county, and *Davis*, by which, as junior judgment-creditors of one *Minick*, they sought to recover an overplus which

said sheriff had received on an execution against *Minick*, and which he had paid to *Davis*, as *Minick's* assignee. The following are the facts:

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LAND.

Minick held the equitable title to two lots in *Canby's* addition to the town of *Crawfordsville*, the legal title being in *William Twining*. *S. C. Willson* loaned *Minick* the money to pay *Twining* for the lots, and took an assignment of *Twining's* obligation for a conveyance, as a security for its repayment. *Willson* received a conveyance from *Twining* for the lots, which he held subject to *Minick's* right to a conveyance, whenever he should refund the money loaned. *Minick* having erected a house on the lots, *Epperson* and others joined in a bill to enforce several mechanics' liens against the property, which was pending at the *September* term, 1851, of the *Montgomery* Circuit Court, when *Willson*, on his petition, was admitted a defendant, who set up his claim as a lien for the purchase-money, prior to that of the complainants. A decree was rendered giving him priority; the amount of the several liens was fixed by the decree; and the property ordered to be sold on a credit of six months, in default of payment, taking from the purchaser a note with security.

On the 27th of *January*, and the 7th of *February*, 1852, *Cumberland*, *Collins* and *Sperry*, the appellees, obtained judgments against *Minick* before justices of the peace, transcripts of which they immediately entered in the clerk's office, with a view of securing liens upon his real estate.

On the 24th of *February*, a special execution was issued upon the decree, to *Ramey*, the sheriff of said county.

On the 8th of *March*, *Davis* purchased the property from *Minick*, for which he agreed to pay the amount of the decree, and about 31 dollars, arrearages of taxes on the property, and 42 dollars in money, which he paid to *Minick*. *Minick*, at the same time, gave *Davis* an instrument of writing, which states that the amount which would be due to the several claimants under the decree, on the 27th day of *March*, (the day the sheriff was to sell,) would be 1,276 dollars and 64 cents, and directing the sheriff to pay the overplus to *Davis*.

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LAND.

On the 27th of *March*, the sheriff sold the property for 1,460 dollars, and *Davis* became the purchaser, for which sum he gave his note to the sheriff, due six months after date, with security, which exceeded the amount due on the execution by about 148 dollars. *Ramey* did not demand this balance from *Davis*, but surrendered him the note, conceiving, as he says in his answer, that he was entitled to the overplus, as the assignee of *Minick*.

The complaint alleges that the arrangement between *Davis* and *Minick* was made to enable *Minick* to defraud his creditors, which *Davis* denies. The same charge is made and denied as to *Ramey*.

There is no extrinsic evidence of fraud in the case. It appears from the testimony of *Minick*, and of several other witnesses, that he had made various attempts to sell his property for enough to pay the demands against him, including the plaintiffs', in which he had been unsuccessful. He offered the property to *Winn* for 1,600 dollars, and *Winn* offered him 1,400 dollars for it. He concluded a treaty with *Linn* for the sale of the property, who was to pay the decree and the plaintiffs' judgments, but the treaty was broken off by the discovery of the claim for taxes spoken of.

Minick says he had no intention to defraud his creditors by the sale to *Davis*, but that it was to prevent a sacrifice of the property, apprehending it would not probably produce at a forced sale as much as *Davis* was to pay for it.

Willson, who was a witness for the plaintiffs, testifies that at the time of *Davis*' obtaining from *Minick* the order for the overplus, he applied to him for a conveyance of the property, which he declined to make, because he held the property in trust, and because of the plaintiffs' judgments. *Sperry*, one of the plaintiffs, was present, and bid at the sheriff's sale.

Upon this state of facts the Circuit Court gave judgment for the plaintiffs against *Davis* and *Ramey*, for the amount of their claims against *Minick*, which were less than the overplus before mentioned.

The only question, as we conceive, arising upon this record, is, whether the plaintiffs, by the filing of the transcripts of their judgments in the Circuit Court, acquired liens upon the lots in question. The appellees do not claim, as we understand them, that by *Minick's* purchase from *Twining* he acquired any title upon which a lien could attach. Since the case of *Modisett v. Johnson*, 2 Blackf. 431, it has been considered the settled law in this state, that a judgment is no lien upon land which the debtor holds by bond conditioned for the execution of a title on payment of the purchase-money, though he had taken possession, and paid the money, before the rendition of the judgment. That case has been repeatedly reviewed and steadily adhered to. *Orth v. Jennings*, 8 Blackf. 420.—*Doe v. Cutshall*, 1 Ind. R. 246.—*Dickerson v. Nelson*, 4 *id.* 160.

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But it is insisted that the decree which subjected the lots to sale, as the property of *Minick*, invested him with the legal title. The argument is, that the decree divested *Willson* of the legal title, and reduced his estate in the land, in law, to what it was before, in equity, a simple lien, or mortgage, and that as the title could not be in abeyance, it must have been vested in *Minick*, who had the right to redeem. We can not subscribe to this doctrine. The decree did not profess to transfer the title; and there was no conveyance. We will take the illustration used by the appellees. They ask: "Suppose *Minick* had paid the decree without sale, in whom would the legal title have been?" And they answer: "It could not have been in *Willson*, because he had surrendered it by taking a decree for his money; not in *Twining*, because he had conveyed it to *Willson*; and it must therefore have been in *Minick*, because he had purchased and paid for it."

The mistake we conceive to be in assuming that the holder of the legal title, by taking a decree for his money, has parted with it. Suppose he had obtained the ordinary decree to enforce a vendor's lien, (and such, in fact, was this decree as between *Willson* and *Minick*,) and it had been afterwards paid, would the case have been different?

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We suppose that a vendor parts with none of his rights until payment, and when that is made, the purchaser is in the position contemplated in the case of *Modisett v. Johnson*, *supra*: he is in possession, and has paid the purchase-money, and has a right to call for the legal title, but as yet has no estate upon which a judgment-lien can attach. No authorities have been shown to the effect that a proceeding to enforce a lien prosecuted to final decree, is a transfer of the legal title, and we are not aware of any.

Another position assumed by the appellees, is, that supposing they had no lien, still having obtained a judgment and done all they could to enforce their claim, they can reach this money as equitable assets. They allege that *Minick* had no property, and that *Davis* and the sheriff knew of their judgments, and these allegations, not being denied by the answers, are taken as admitted. But we do not conceive that the mere circumstance that *Minick* was insolvent, and that his indebtedness to the plaintiffs was known, gave them any equitable claim upon the fund, even if it had not been assigned to *Davis*. We do not see but that the sheriff would have been as much bound to pay the overplus to any other creditor as to the plaintiffs. Unless some legal steps were taken, to arrest the money in his hands, he would have been bound to pay it to *Minick*, or to his assignee. The fund, however, had been assigned to *Davis* long before any steps were taken by the plaintiffs to reach it, and we do not perceive that they have any legal or equitable claim upon it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with instructions to the Circuit Court to render judgment for the defendants.

A. Thomson, B. T. Ristine and I. Naylor, for the appellants.

S. C. Willson and J. E. McDonald, for the appellees.

BARKER v. HOBBS.

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The party in whose favor a demurrer is decided, can not complain of the decision.

A material averment in an answer, which is not noticed by the reply, is regarded as admitted.

A grantee to whom land has been conveyed with a covenant against incumbrances, who claims to have discharged an incumbrance after the execution of the conveyance, must show that it was a valid and subsisting incumbrance when the deed was executed.

APPEAL from the *Tipton* Court of Common Pleas.Saturday,
June 9.

GOOKINS, J.—*Hobbs*, as the assignee of *Brower*, sued *Barker* upon a promissory note.

Barker answered that the note was given for the last payment of the consideration-money of certain lots in the town of *Tipton*, which *Brower* conveyed to him with warranty of title and against incumbrances; that *Brower* represented to him that he had separated from his wife, and that she had entered into articles of separation with him, by which she had released all claim to dower in said property, which representations were false; that she had been divorced from *Brower*, by a decree of the *Henry* Circuit Court; that she threatened to enforce her claim of dower against the property, whereupon he purchased in her claim, and took her release, for which he paid her more than was due on this note; and that her claim was worth what he paid for it.

A demurrer to this answer was overruled, and the plaintiff replied, denying the false representations, the divorce, the extinguishment of any outstanding right of dower which was an incumbrance upon the property, &c. Trial by the Court. Finding and judgment for the plaintiff. The defendant appeals.

It is immaterial whether the ruling of the Court of Common Pleas was right or wrong upon the demurrer. The decision was in favor of the appellant, and he can not complain of it.

The record contains the evidence.

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In support of the answer, the defendant gave in evidence the record of a decree of the *Henry* Circuit Court, at the *March* term, 1853, in the case of *Christopher Brower v. Mary Brower*, by which they were divorced; also a deed of release from said *Mary* to the defendant of her interest in the property in question, dated *May* 30, 1853, for the consideration of 100 dollars, and a deed to him from *Brower* of the property, dated *September* 28, 1852, for the consideration of 650 dollars. He proved also that *Mrs. Brower* was twenty-seven years of age and in good health. The consideration of the note, as set out in the answer, not having been denied by the reply, must be taken as admitted. There was no proof of any false representations made by *Brower* to the defendant. What he said to others is of no consequence. The defendant's allegation is, that the false representations were made to him.

By this evidence the defendant has failed to show that *Brower's* wife had any interest in the property. The divorce was adjudged under the act of 1843, which provides that whenever a divorce is decreed on account of the misconduct of the husband, the wife shall be entitled to dower in his lands, in like manner as if he were dead. R. S. 1843, p. 604. No part of the proceedings for divorce is before us except the decree, which shows that it was granted at the instance of the husband; from which, if we draw any inference at all, it is, that it was granted for the misconduct of the wife. Admitting that *Barker* had a right to extinguish an incumbrance before being disturbed in his possession, a question we do not decide, if he did so he took upon himself to prove that it was a valid and subsisting claim upon the property. Having failed in this, the judgment of the Court of Common Pleas upon the evidence was right.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

W. Garver and *J. A. Lewis*, for the appellant.

D. Moss, for the appellee.

THE STATE on the relation of ABRAHAMS v. CROSS and
Others.

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1855.
THE STATE
v.
CROSS.

In a suit tried under the former practice, defects not cured by the statute of jeofails are still available on error.
In a declaration upon an official bond payable to the state, the non-payment of the penalty need not be averred.
In a suit upon an official bond, the parties agreed to submit the issues of fact to a jury. *Held*, that the assessment of damages was included.
In suits upon penal bonds, it is only upon the determination of questions of law in favor of the plaintiff, or upon a default, that the interlocutory judgment, that the plaintiff ought to recover, but because, &c., is given; and the Court may be substituted for the jury to assess the damages.
In a suit, under the R. S. 1843, upon the bond of a constable, judgment was rendered for the *plaintiffs*, instead of the state, for the use, &c., and for *damages*, instead of the penalty. *Held*, that the defect in the entry was a mere irregularity, which, being amendable in the Court below, was to be regarded as amended in the Supreme Court.

APPEAL from the *Madison* Circuit Court.

Saturday,
June 9.

STUART, J.—Debt on the official bond of a constable, assigning several breaches. As no issues of law are raised in the record, it is not necessary to state the pleadings. The issues of fact were tried by the Court by agreement. Finding and judgment for the plaintiff.

There is none of the evidence in the record, and no question raised by bill of exceptions. But the suit being tried under the old practice, defects not cured by the statute of jeofails will still be available on error.

The first error assigned is, that the breach does not negative the payment of the penalty. In official bonds payable to the state, the non-payment of the penalty need not be averred. *The State ex rel. Merrill v. McClane*, 2 Blackf. 192.

The second error assigned is, that there is no finding by the Court below that the state *ought* to recover her said debt, nor is there any judgment for the debt. The third and fourth errors, in relation to the power of the Court to assess damages, and its neglect to award execution, are so closely connected with the second assignment, that they may be considered together.

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v.
Cross.

There is no difficulty about the assessment of damages. By the express agreement of the parties, the Court was substituted for a jury to try the issues. The assessment of damages was included. This is a common and convenient practice, authorized by the statute. R. S. 1843, p. 731.—4 Blackf. 311. It is only on the determination of questions of law in favor of the plaintiff, or by default, that the interlocutory judgment is given, viz., that the plaintiff ought to recover, but because the Court is not advised of the damages, &c. 1 Blackf. 144.—*Id.* 198. But the Court may be substituted by consent. 1 Blackf. 358.

That the record subsequent to the submission of the issues to the Court is, in many respects, informal, is very true. The judgment is for damages. Regularly it should be for the penalty of the bond, awarding execution for the damages assessed; or rather ordering to be indorsed upon the execution the amount of damages to be collected. *Morris v. Price*, 2 Blackf. 457. The judgment is for the *plaintiffs* for the amount of the finding, instead of being in favor of the state, for the use, &c.

It is argued that these are mere misprisions of the clerk, such as being amendable in the Court below, shall be taken as amended in this Court; and in favor of that position, *Smith v. Myers*, 5 Blackf. 223, and 2 R. S., pp. 162-3, are cited. But *Smith v. Myers* does not, in our opinion, go to the extent claimed. The decision was on a demurrer to a bill in chancery for want of equity, and relates therefore only to what is essential to the validity of the bill. *McManus v. Richardson*, 8 Blackf. 100, is a much stronger case. There judgment was taken against two defendants, when the record showed that only one was served. It was held that the mistake was clerical, and therefore amendable. But this ruling is greatly modified by the statement that the adverse party agreed to the Supreme Court making the amendment, if it could be made by the Circuit Court. In *Woodward v. Brown*, 13 Peters 1, the Court allowed a misprision of the clerk, in entering the judgment, to be amended, without awarding a *certiorari*. But this seems to have been under the judicial act of 1789.

It is urged that the case is within 2 R. S., 162-3. But without examining the provisions referred to, that act does not apply. The suit was determined some months before the revised statutes of 1852 took effect. And the rule in *Glidewell v. McGaughey*, 2 Blackf. 359, and *Morris v. Price*, *id.* 457, must govern, unless there is some other statutory provision than those referred to by counsel. For, in the cases referred to in 2 Blackford, the same irregularity existed as here, and the judgments were reversed. These decisions were made under an act to cure defects after verdict; and among the things which it was provided should not be sufficient to reverse, was "any informality in entering up the judgment by the clerk." R. S. 1831, p. 411. In addition to that the several acts of parliament in force in *England* prior to *February 7, 1752*, in relation to "mispleading and amendment," were by the same act declared to be in full force in this state.

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CROSS.

Unless, therefore, the R. S. of 1843 have enlarged these curative provisions, this case must, on the authority of those in 2 Blackford, *supra*, be reversed. Section 84, chapter 37, of that revision, reads thus:

"No judgment in any civil action shall be stayed, reversed, impaired, or affected for any defect of form, variance or other imperfection contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the Court in which such judgment was rendered; but such defects and imperfections shall be supplied and amended, or shall be deemed to be supplied or amended in the Supreme Court."

The 236th section of chapter 40, the 13th and 14th specifications under it, and section 237 of the same chapter, read thus:

"SEC. 236. When a verdict shall have been rendered in any case, the judgment shall not be stayed thereon, nor shall the judgment on such verdict, or any judgment upon confession, default, *nihil dicit*, or *non sum informatus* be reversed, impaired, or in any way affected by reason of the following imperfections, omissions, matters or things, or

May Term, 1855. any of them, in the process, pleadings, proceedings, or record, namely:

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• • • • •
 "13. For any informality in entering a judgment, or making up the record thereof, or in any continuancē, or other entry upon such record; nor,

"14. For any other default or negligence of any clerk or officer of the Court, or of the parties, or their attorneys, by which neither party shall have been prejudiced.

"SEC. 237. The omissions, imperfections, defects, and variances, in the preceding section enumerated, and all others of the like nature, not being against the right and justice of the matter of the suit, and not altering the issue between the parties, or the trial, shall be supplied and amended by the Court where the judgment is given, or by the Court into which such judgment shall be removed by appeal or writ of error."

In *Saxton v. The State*, on *scire facias*, 8 Blackf. 200, these provisions came before the Court for consideration, and the Court held, that as the Circuit Court might have amended, the Supreme Court is bound to amend or consider the amendment made. It is true, the facts in the case were entirely different from those before us. We think, however, that a fair construction of those statutory provisions gives them a much wider range than could be given to the provisions on the same subject in force when the cases in 2 Blackford were decided. We are therefore of opinion that it is a mere irregularity in entering the judgment, within the meaning of the act, by which the appellants have not been prejudiced; and being amendable in the Circuit Court, we must regard it as amended here.

Per Curiam.—The judgment is affirmed with costs.

J. Davis, for the state.

D. McDonald, W. A. McKenzie and W. Henderson, for the appellees.

DART v. McQUILTY and Another.

May Term,
1855.DART
v.
McQUILTY.

A. purchased from B. two town-lots, and received a title-bond, conditioned for the execution of a conveyance upon full payment of the purchase-money. Having failed to pay the last instalment, a judgment was obtained therefor before a justice of the peace. Execution thereon and a return of no goods, &c. To a bill by an assignee of the judgment against A. and B. to subject the lots to sale to satisfy the judgment, the defendants answered that B. only owned two-thirds of the lots, and hence could not convey according to contract. Replication, in avoidance, &c.

Held, that A., had he elected, at the proper time, to rescind the contract, in consequence of the partial failure of consideration, would have been entitled to the purchase-money and interest, and would have had a lien on the lots for it; but, *held*, that having elected to retain them, he had an equitable interest therein at least to the extent of two-thirds, which might be subjected to execution upon said judgment.

A bill in equity ought not to be dismissed for the want of proper parties.

APPEAL from the Decatur Circuit Court.

Saturday,
June 9.

STUART, J.—*McQuilty* purchased two lots in *Greensburg* from the other defendant, *Dillier*. He paid all the purchase-money, except the last note, on which there was judgment at law. After several assignments, the judgment finally came into the hands of *Dart*. He filed this complaint in the nature of a bill in chancery, to reach the equity of *McQuilty*—making the vendor, *Dillier*, a party.

Dillier and *McQuilty* answered that the former owned only two-thirds of the lots, and could not convey according to contract.

Replication, that the failure of consideration resulting from *Dillier's* imperfect title had been set up as a defence at law in the suit by the assignee against *McQuilty* on the last note, and could not be again set up as a defence.

Demurrer to the replication sustained, and the bill dismissed.

This was error. *McQuilty* had some interest in the lots. Whatever that interest might be, it was subject in equity to the execution for the use of *Dart*. *Bryer v. Chase*, 8 Blackf. 508. Had *McQuilty* elected, at the proper time, to rescind the contract, in consequence of the partial failure of the consideration, he would have been entitled to the purchase-money and interest, and had a

May Term, 1855. **MOORE v. SMOCK.** lien on the lots for it. *Shirley v. Shirley*, 7 Blackf. 452. Having elected to retain the lots, he had an equitable interest, at least, to the extent of *Dillier's* title, viz., two-thirds. To this extent the complainant was clearly entitled to a decree, subjecting *McQuilty's* equitable interest to execution.

If the want of parties was the ground of objection in the Court below, the bill should not have been dismissed, even under the old practice. *Stanley v. Beatty*, 4 Ind. R. 134.—*Park v. Ballentine*, 6 Blackf. 223.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

B. W. Wilson and *S. A. Bonner*, for the appellant.
J. Ryman, for the appellees.

MOORE v. SMOCK and Others.

In an appeal taken to the Circuit Court from proceedings of the board of commissioners in laying out a highway, a transcript of the proceedings of the board was filed, but none of the original papers. *Held*, that the appeal was properly dismissed on motion.

The Circuit Court dismissed an appeal from the board of commissioners, and no exception was taken. *Held*, that an appeal would not lie to the Supreme Court.

Saturday,
June 9.

APPEAL from the Marion Circuit Court.

DAVISON, J.—*Thomas C. Smock* and others, at the *June* term, 1851, filed their petition before the board of commissioners of *Marion* county, for the location of a public highway from the *Shelbyville* state road, in *Franklin* township, to the *Leavenworth* state road, in *Perry* township. The petition describes the proposed highway, names the owners of the land through which it will run, and prays the appointment of viewers, &c. The board, in accordance with the prayer, appointed three viewers, two of whom, at the *September* term, 1851, reported that they had

laid out and marked the proposed highway, and that the same, when opened, would be of public utility, &c. May Term,
1855.

At the last-named term, *David Mars* and others severally remonstrated against the opening of said highway; but these remonstrances were acted on and disposed of by the board, and the case was regularly continued from term to term until the *March* session, 1852, when *Samuel Moore*, the appellant, who was a petitioner for the road, filed his remonstrance. It was therein alleged, *inter alia*, that the contemplated road passed through his, *Moore's*, land, and, if established, would damage said land 100 dollars, and would not be of public utility, &c. Thereupon the board ordered the remonstrance to be filed, and appointed three reviewers, who, at the *June* term, 1852, made report that *Moore*, by reason of the passage of the road through his land, will sustain damage to the amount of 50 dollars, and that the highway will not be of public use, &c.

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v.
SMOCK.

Upon the filing of this report, the petitioners for the road appeared, and moved the board to set aside the review on *Moore's* remonstrance; which motion was sustained, and the highway ordered to be opened, &c.

From this decision of the board, *Moore* appealed to the Circuit Court; and from the record before us, it appears that that Court had no other papers before it but a transcript of the record of the proceedings of the board of commissioners.

The appeal was dismissed by the Court, and we think correctly, because it had no authority to try the case without having before it the original remonstrance filed by *Moore*, and the original report of the reviewers appointed to review the road. This Court has repeatedly decided, that a Circuit Court is to try an appeal from an order of the board of county commissioners, *de novo*, as a Court of original jurisdiction, and not as a Court of Errors. 4 Blackf. 116.—5 *id.* 594.—8 *id.* 62.

There is another ground upon which the decision of the Circuit Court must be sustained. No exception was taken to the dismissal of the appeal; and we can not, therefore, regard the cause as properly before us.

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WMST
v.
BRADLEY.

Per Curiam.—The judgment is affirmed with costs.
J. L. Ketcham and *N. B. Taylor*, for the appellant.
L. Barbour and *A. G. Porter*, for the appellees.

WEST and Another v. BRADLEY and Others.

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Action upon a written agreement, whereby the defendants agreed to sell to the plaintiffs their entire crop of corn, at 40 cents per bushel, to be measured by the two-foot gauge, at the rate of two cubic feet per bushel; which measurement was to be final, whether the same should exceed or fall short of the statute weight. The complaint stated, that prior to the date of the agreement, the defendants, with intent to defraud any person who might purchase the corn, had placed large quantities of rails and other substances amongst it, so as not only to conceal the same, but to form large cavities, and increase the apparent bulk of the corn; that while the corn was in this condition it was gauged to the plaintiffs and received by them, in ignorance of the fraud, &c., at, &c., (stating the number of bushels and the excess thereof over the real quantity). Issues of fact, &c., trial by jury, and verdict and judgment for the plaintiffs. The evidence was not set out in the record. The Court instructed the jury, that if, on account of the fraud of the defendants, the quantities of foreign substances placed among the corn, and the plaintiffs' loss, could not be precisely ascertained, the jury might regard the difference between the gauged measure and the weights, and all other facts in evidence bearing upon the question of amount, &c.

Held, that the instructions must be presumed to have been applicable to the evidence.

Held, also, that the instructions were correct.

Saturday,
June 9.

APPEAL from the *Dearborn* Circuit Court.

DAVISON, J.—The appellees, who were plaintiffs below, sued *Warren* and *Stephen West* upon a written agreement entered into between the parties, dated *December 10, 1852*, whereby the defendants agreed to sell to the plaintiffs their entire crop of corn raised that year, at 40 cents per bushel, to be measured by the two foot gauge, which is at the rate of two cubic feet for a bushel. It was agreed that this mode of measurement was to be final, without any regard to whether the same exceeded or fell short of the statute

weight. The corn was to be gauged within eight days from the date of the contract, and to be paid for on delivery.

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V.
BRADLEY.

The complaint is, that prior to the date of the agreement, the defendants, with intent to defraud whomsoever might purchase the corn, had placed large quantities of rails and other substances amongst it, in such a manner as not only to conceal the same, but so as to form vast cavities therein, and thereby increase its apparent bulk; that while the corn was in this condition, it was gauged to the plaintiffs and received by them as fourteen thousand five hundred and fifty bushels; that believing that measurement to indicate the exact quantity of corn in the defendants' cribs, they paid them for the above number of bushels, when, in truth, the plaintiffs received eleven thousand and two bushels and no more; and that this difference in the quantity, which, it will be seen, was three thousand five hundred and forty-eight bushels, was produced by the fraudulent conduct of the defendants, in placing rails, &c., amongst the corn, as before stated.

Issues of fact were submitted to a jury, who returned a verdict for the plaintiffs, upon which the Court rendered a judgment.

The Court, in its charge, told the jury, that "if the defendants fraudulently placed rails or other substances in the corn, the amount of which substances is uncertain, they can not take advantage of that uncertainty in proof." "If the defendants have been guilty of fraud, they must bear the loss of such uncertainty." "And if, in consequence of their fraudulent acts, the quantities of foreign substances and the plaintiffs' loss can not be precisely ascertained, the jury need not be nice and close in their calculations, but may look at the difference between the gauged measure and the weights, and all other facts proven bearing upon the question of amount, in order to ascertain the extent of the fraud practised on the plaintiffs; and the fraud being proved, the defendants must bear the loss of the uncertainty, if any exists, in the mode of arriving at the extent of the deception."

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1855.

WHEAT
v.
BRADLEY.

These instructions are said to be erroneous, 1. Because they allow the jury the right to look at the weights to ascertain the extent of the fraud; and 2. Because the jury are told, "that if fraud was practised, the plaintiffs' damages should be estimated at the highest rate." The latter position assumes ground not taken by the Court in its charge. The jury were not told to estimate damages at the highest rate. That point will not, therefore, be further noticed.

As the evidence is not upon the record, we must presume that it was sufficient to authorize the instructions; and in favor of the ruling of the Court it will be intended that the testimony adduced on the trial proved an exact correspondence in quantity between a bushel of corn in weight, as prescribed by the statute, and one ascertained by the "two-foot gauge." It is true, the contract stipulates that the number of bushels sold should be indicated by gauge, and not by weight, but that provision relates to a *bona fide* performance of the agreement. It can not be allowed to control any proper mode of eviscerating fraud, or estimating the extent of any damage that may result from it. If the defendants intentionally placed rails or other substances in their cribs, with a view of producing an overestimate of the quantity of corn, it is too clear to require comment, that the jury, in estimating the extent of the fraud, had a right to look at the weight of the corn actually received by the plaintiffs, as well as all other evidence in the cause tending to elucidate the transaction and prove the amount of damages really sustained by the deceitful conduct of the defendants.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. Ryman and *P. L. Spooner*, for the appellants.

E. Dumont, *D. S. Major*, *O. B. Torbet* and *A. Brower*, for the appellees.

SHERRY and Others v. THE STATE BANK OF INDIANA.

May Term,
1855.SHERRY
v.
THE STATE
BANK.

A person was erroneously joined as a co-plaintiff in a writ of error, and having no interest in the proceedings, his name was struck out in the Supreme Court, after the execution of the supersedeas bond. *Held*, that the amendment did not discharge the sureties in the bond.

In error upon a judgment against the defendant in ejectment, the supersedeas bond, under the R. S. 1843, rendered the obligors liable for the mesne profits, whether they were received by the judgment-defendant or not.

From a judgment against the defendant, in ejectment, he prosecuted a writ of error to the Supreme Court, and executed a supersedeas bond, with sureties, to stay further proceedings upon the judgment. The judgment having been affirmed, suit was brought on the bond. *Held*, that the defendants could not, in this suit, be allowed for the value of improvements made.

In debt upon a supersedeas bond there was issue on a plea of *nul tiel record*. The Court did not formally find upon that issue; but the record showed that the issue was proved in favor of the plaintiff, and the Court rendered a general judgment upon the verdict of the jury. *Held*, that a judgment upon the plea of *nul tiel record* must be regarded as included in the general judgment.

After a motion in arrest of judgment a motion for a new trial will not be entertained.

ERROR to the *Tippicanoe* Court of Common Pleas.

Saturday,
June 9.

Per Curiam.—Debt on bond. Judgment for the plaintiff.

The bond was given to stay proceedings in an ejectment, during the pendency of a writ of error.

One person was erroneously joined as a co-plaintiff in the writ, and, having no interest in the proceedings, his name was stricken out in the Supreme Court, after the supersedeas bond had been given. It is contended that this amendment discharged the sureties on the bond, but we think not. The law permitting such amendments was known to those executing the bond, and it must be supposed to have been signed subject to all such contingencies. The amendment did not abate the writ of error, for the prosecution of which the bond was given.

Another question is made as to the amount recoverable for mesne profits. It is contended that the plaintiff could only recover for them while it was shown that the plaintiffs in the writ of error were in the reception of them. We think the position untenable. The bond prevented

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THE STATE.

the plaintiff in the ejectment from taking possession, and, hence, it was not material who enjoyed the rents and profits. The plaintiff relied on the supersedeas bond, and it was conditioned for the payment of the mesne profits "as well before as during the pendency of the writ of error." The Court below allowed them to be recovered from the time of the demise laid in the declaration in the ejectment suit.

We think the defendants were not entitled to deduct, in this suit, the value of improvements made.

There was no formal finding by the Court of the issue upon the plea of *nul tiel record*; but as the record shows the issue was proved in favor of the plaintiff, and the Court rendered a general judgment on the finding of the jury, we must regard the judgment on the plea of *nul tiel record* as included in that judgment.

After the coming in of the verdict of the jury assessing the damages, a motion was made in arrest of judgment, which motion was overruled. Subsequently a motion was made to set aside the verdict and for a new trial, which was also overruled. This latter motion was made too late to be noticed, and the former was correctly overruled.

The judgment below is affirmed with costs.

R. C. Gregory and R. Jones, for the plaintiffs.

H. W. Chase, for the defendant.

BUNDAY and Others v. THE STATE.

By the R. S. 1852, only one docket-fee can be taxed in any case, whatever may be the number of defendants.

Saturday,
June 9.

APPEAL from the *Orange* Court of Common Pleas.

PERKINS, J.—Prosecution against *John Bunday* and nine others for a riot. Conviction by a jury, and a fine upon each defendant of one cent.

The judgment was as follows :

"It is therefore considered by the Court, that the said state of *Indiana* do recover against the said defendants the said sum of one cent each, and that they pay the costs of this prosecution, and be committed till the same be paid or replevied, and that the clerk of this Court do tax with the other costs of this prosecution a docket-fee of four dollars against each of said defendants for the use of" the prosecuting attorney, naming him.

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1855.

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V.
THE STATE.

The only exception taken is to the part of the judgment giving several docket-fees. It is contended that, as the trial of all the defendants was joint, there was but one case and should have been but one docket-fee.

At the *November* term, 1838, this Court decided that under the statute then existing giving costs, which provided that "for every conviction," &c., there should be a docket-fee, &c., the prosecuting attorney was entitled to several docket-fees in a joint prosecution and conviction of several defendants. *The State v. Cripe*, 5 Blackf. 6. At the same time, in civil causes, but one docket-fee was taxed under a provision giving docket-fees "in all civil actions at law." R. S. 1831, p. 253. And in 1843 the legislature, as if dissatisfied with the construction put upon the act of 1831 by the Supreme Court, enacted, R. S., p. 1050, sec. 1, that in criminal cases "no more than one docket-fee shall be charged upon or for the trial of any one indictment or presentment." This provision settled the question till 1852. In the code of that year it was provided, on p. 22, of the second volume, sec. 36, that "in all cases, civil and criminal," "a docket-fee of three dollars," &c., shall be taxed, &c., and paid to the county treasurer, &c. This provision was enacted *May* 14, 1852. And in the first volume of the same code, p. 288, a docket-fee, "in cases in Court of Common Pleas, on plea of not guilty," of four dollars, is given to the prosecuting attorney. This provision was enacted *June* 16, 1852.

It is unnecessary that we should here decide whether both of these provisions are in force, and if not, which is operative, as we think that neither of them gives several

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docket-fees in joint judgments. In the case before us there was but one trial, one judgment, one "case," and the statute provides for but "a docket-fee," that is, one docket-fee, in a case. We think the Court below erred in taxing a docket-fee against each defendant.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. McDonald and *W. A. McKenzie*, for the appellants.

D. C. Chipman, for the state.

THE MARTINSVILLE AND FRANKLIN RAILROAD COMPANY
v. BRIDGES.

In a claim for damages, under the R. S. 1838, for injuries to land occasioned by the construction of a public work, the same strictness is not required in the averments as in pleadings in a Court of record.

The written statement of the claim should show, however, whether the injury was occasioned by the passing through and appropriation of the claimant's land, or the taking of timber and other materials for which the statute provides.

A claim for damages, governed by the provisions of the R. S. 1838, for an injury to the claimant's land occasioned by the construction of a railroad, stated that the land was injured, &c., to the amount, &c., as follows: that the road, as located, "angled" through the claimant's land, and passed over the same, &c., to the distance, &c., and over a part which was improved and cultivated; wherefore, &c. *Held*, that the statement was sufficient to enable the claimant to recover for the injury occasioned by the grading of the road, and the division of his land into inconvenient parts.

Monday,
June 11.

APPEAL from the *Marion* Circuit Court.

GOOKINS, J.—The appellants having constructed their railroad through the lands of the appellee, he presented his claim for the assessment of damages. Appraisers were appointed by the company, who awarded him 100 dollars, from which award he appealed to the Circuit Court, where, after a change of venue, there was a trial by jury, which resulted in a verdict for 500 dollars in favor of the plaintiff. Motion for a new trial overruled, and judgment.

No question was raised on the trial upon the admissibility of the evidence, all that was offered on both sides having been received without objection; from which it appeared that the road was constructed through the plaintiff's land, a distance of some three hundred rods or more; that a portion of the distance required cuts and embankments in grading; and the witnesses in estimating the damages took those circumstances, with others, into consideration, and also the injury resulting to the plaintiff from the dividing of the farm into inconvenient parts.

The jury were instructed that in estimating the damages, they might take into consideration the land taken for the road; the courses across the plaintiff's land, as straight or crooked, direct or angular, and the inconvenience resulting from cuts and embankments, and of passing from one part of the land to another, by the plaintiff or his cattle.

The defendants excepted to these instructions, and prayed the following:

1. Under the written claim of the claimant, no damages can be allowed for any injury to the premises not particularly described in its nature in the claim.

2. As the claimant has not claimed any damages resulting from cuts and embankments, no damages can be allowed for any such injury.

3. As the claimant has not claimed any damages on account of any injury resulting from the premises being divided by the road into unequal and inconvenient parts, no damages can be allowed for any such unequal or inconvenient division of the premises.

These instructions the Court refused to give, and the defendant excepted.

The claim for damages which the plaintiff presented to the company states that his lands are injured by the location of the road through them to the amount of 1,200 dollars, as follows: That the road, as located, angles through his several tracts of lands, and passes over and through the same, to the distance of about four hundred and ninety-five rods; that it passes over a portion of said lands which

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are improved and cultivated; wherefore he prayed that his damages might be assessed.

The statute which authorizes this proceeding provides, that the person feeling aggrieved by the construction of a public work, shall make out a written statement of the cause of complaint, particularly describing the nature of the injury, and the interest of the complainant, &c. R. S. 1838, pp. 343-4, s. 17.

We do not think it was the intention of the legislature, in providing for cases of this kind, to require that degree of strictness which would be observed in pleading in Courts of record. The design was to provide a simple and easy mode of ascertaining what damages were occasioned to the citizen by the taking of his property for a public use. It is not, in the first instance, a proceeding in Court, but a claim presented to the party from whose acts the injury is supposed to ensue. That party is presumed to know and does know much more about the nature of the injury than the owner of the land. The cuts and embankments are shown by the surveys, and are matters of which the claimant may know little or nothing at the time he makes his claim. He is limited to two years after the appropriation of his property, for presenting his claim; and more time than this may, and from the known history of our public works, often does elapse after a particular part of the work is entered upon, and the property taken, before it is finished and the height of embankments and depth of cuts known. The complaint states that the road was to be made through the plaintiff's land. The making necessarily included grading. It was, therefore, unnecessary to state that the road was to be graded, or that damages were claimed for a high or low grade.

Nor do we think it was necessary to specify the injury resulting from the division of the plaintiff's land into inconvenient parts, by the construction of the road. The complaint states, as a ground of damages, that the road, as located, passes through the plaintiff's improved and cultivated lands. We do not see how that could well be, without dividing them into separate parcels.

It is to be observed that the statute authorizes the taking of other property besides land; such as timber, stone, and other materials necessary for the construction of the work. The reasonable inference is, that the claim should show whether the injury resulted from passing through and appropriating the lands of the claimant, or the taking of other property which the statute authorized.

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1855.

THE BOARD
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TIPPECANOE
COUNTY
v.
Cox.

We think the claim was sufficiently specific to cover the damages proved.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

L. Barbour and *A. G. Porter*, for the appellants.

F. M. Finch, for the appellee.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY
v. Cox.

By the act of 1841, "to provide for the payment of the debts contracted by the late mayor and common council of the town of *Lafayette*, under the charter of said town," the board of commissioners of *Tippecanoe* county were constituted a Court of claims to adjudicate upon the demands against the late corporation, with power to levy and collect from the corporators alone the necessary taxes to pay said demands.

Neither the auditor nor the board of commissioners of *Tippecanoe* county had authority, under that act, to issue an order for the payment of a demand against the late corporation of *Lafayette* out of the general funds of the county.

An agent may bind his principal by acts, and sometimes by omissions of duty, but he can not bind others.

APPEAL from the *Tippecanoe* Circuit Court.

Monday,
June 11.

GOOKINS, J.—*Cox*, as assignee of *Ellis*, brought a suit against the board of commissioners of *Tippecanoe* county, on two county orders, one of which is in the following form:

"§50. No. 94. Treasurer of *Tippecanoe* county: Pay to *John T. Ellis*, or bearer, fifty dollars, for (in part) services

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as corporation officer, out of any moneys in the treasury not otherwise appropriated, by order of the board of commissioners of said county, at their special *September* session, 1841. This 28th day of *September*, 1841. [Signed,] *David Webb*, auditor."

The other order is for 63 dollars and 59 cents, and differs from the preceding only in amount. It is agreed that they were duly assigned to the plaintiff.

In 1840 an act was passed repealing the charter of the town of *Lafayette*. Local Laws 1840, p. 69.

In 1841 the legislature passed "an act to provide for the payment of the debts contracted by the late mayor and common council of the town of *Lafayette*, under the charter of said town." Local Laws 1841, p. 103. The defendants, in their answer, set out this act in full. It authorizes the board of commissioners to receive and adjudicate upon the claims left unpaid by the mayor and council, at their dissolution, and to authorize their payment by the county treasurer, out of any moneys in his hands collected for the payment of said debts. On ascertaining the amount due, they were authorized to levy an *ad valorem* tax upon the property taxable under the charter, sufficient to pay the claims, and all expenses, and to appoint a collector to collect said taxes, (prescribing the mode of proceeding,) and to pay them to the county treasurer, who is required to receive and pay out the money collected by virtue of said act, upon the order of the board of commissioners. The answer then alleges that the board, at a special session, (which they were authorized to hold under the act,) made an allowance to *Ellis* for services rendered the corporation as street commissioner, wharf-master, &c., to be paid out of the funds of the corporation, for which the orders mentioned in the complaint were issued by the auditor; that they made the proper assessment, and at a meeting in *October*, 1841, upon the business of the corporation, they appointed one *Timothy Dame* collector of said taxes, who refused to accept the appointment; that at a subsequent meeting in *November*, they appointed one *Edmunds* a collector of said taxes, who

also refused to accept the appointment; and that none of said taxes, nor any other moneys of said corporation, were ever collected or paid into the county treasury.

To this answer the plaintiff demurred. The demurrer was sustained, and final judgment was rendered for the amount of the orders, from which the commissioners appeal.

This judgment we think can not be sustained. The auditor was not authorized to issue an order, payable out of any moneys in the treasury not otherwise appropriated, and in doing so he transcended his authority. The order of the board of commissioners was that *Ellis* should be paid out of the funds of the corporation, and the auditor's warrant should have conformed to it. His duties are ministerial, and he has no power to charge the county with a liability of this kind, without the authority of the commissioners.

Nor have the board of commissioners any authority to make such allowance to be paid out of the county treasury generally. They seem to have been constituted a Court of claims, to adjudicate upon the demands against the late corporation, with power to levy and collect the necessary taxes from the corporators to pay them. They adjudicated upon the claims, and levied the necessary taxes to pay them, but the collectors they appointed refused to act. Perhaps they have neglected their duty in not appointing a collector who would perform the prescribed service. If so, they may have made themselves personally liable; but that is no reason why the county should be charged with the payment of those debts. The act only authorizes them to direct their payment out of moneys in the treasurer's hands collected for that particular purpose; and had they ordered them to be paid out of any money in the treasury, they would have transcended their authority as much as the auditor did in drawing the orders. They were the agents of the town in this business and not of the county. An agent may bind his principal by acts, and sometimes by omissions of duty, but he can not bind others.

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THE BOARD
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v.
COX.

May Term, *Per Curiam*.—The judgment is reversed with costs.
 1855. Cause remanded, with instructions to the Circuit Court
 to dismiss the suit.
 VEASEY
 v.
 REEVES. *H. W. Chase and J. A. Wilstach, for the appellants.*
S. A. Huff, for the appellee.

VEASEY and Another v. REEVES and Another.

A note was made payable by the makers *when able*. In a suit against them upon the note, it was proved that when they made it they had a stock of goods worth 3,000 dollars.

Held, that the note matured so soon as the makers were able to pay it.

Held, also, that the evidence showed, *prima facie*, that they were able to pay the note as soon as it was given.

Monday,
 June 11.

APPEAL from the *Vigo* Circuit Court.

STUART, J.—*Veasey* and *Veasey* sued *Reeves* and *Reeves*, before a magistrate, on a note, and recovered 71 dollars and 30 cents. The defendants appealed to the Circuit Court. There, it seems, they were permitted to file answers and replies, which, having little bearing on the real issue, need not be noticed.

The trial on appeal was submitted to the Court. Finding and judgment for the defendants. The *Veaseys* appeal to this Court.

A motion for a new trial was interposed and overruled, and the evidence set out.

The note sued upon was in these words, viz.:

"*Terre-Haute, September 10, 1852. \$71 24.* For value received, we promise to pay *Veasey & Co.* seventy-one dollars and twenty-four cents, when able, without any relief from valuation or appraisement laws. *Reeves & Co.*"

At that time the evidence shows the makers of the note had a stock of goods worth 3,000 dollars.

There was some other immaterial evidence offered by both parties, the exact bearing of which on the case we

do not readily see; but nothing to rebut the presumption of their ability to pay, raised by the amount of property which was shown to be in the possession of *Reeves & Co.*

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v.
THE STATE.

The note was payable when the makers were able to pay. If at the moment the note was made they were able to pay, the very next moment the note had matured. It was a present liability, like a due bill. We think the possession of 3,000 dollars' worth of goods is ample evidence from which to infer their ability to pay; especially when there is nothing to repel that presumption. Such a fact threw on *Reeves & Co.* the burden of proving that notwithstanding these apparent means, yet such were their pecuniary affairs, that they were not able to pay. If any hardship in this respect flowed from the vagueness of the contract, it is to be taken most strongly against the makers of the note.

The defendants not having repelled the presumption raised, the plaintiffs were entitled to recover.

There is nothing in the objection that the suit was brought immediately when the note was made. Even if such had been the fact, the evidence shows that the action would not have been premature.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. P. Usher and *C. Y. Patterson*, for the appellants.

T. H. Nelson, for the appellees.

ROSENCRANTS v. THE STATE.

An indictment was found against *A.*, on the 21st of November, 1854, for the murder of *B.*, alleged to have been committed on the 11th of October, 1854; and he was immediately put on trial, and found guilty of murder in the second degree. The homicide was committed when *A.* and *B.* were both drunk, and the evidence consisted chiefly of *A.*'s confessions, and the testimony of one *C.* to a threat made by *A.* about eighteen months before, &c. The case did not seem to be one of great aggravation. Motion for a new trial,

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v.
THE STATE.

on the affidavit of *A.* that he was surprised by *C.*'s evidence, and that it was false, which he could prove, if a new trial were granted, by persons named; that he had been in confinement ever since the death of *B.*, and had had no opportunity to prepare, and no means wherewith to employ counsel; that the defence was made by counsel assigned to him when the case was called for trial, who knew nothing of the circumstances, except as they were developed in the evidence, &c. *Held*, that, under all the circumstances, a new trial ought to have been granted.

Monday,
June 11.

APPEAL from the *Perry* Circuit Court.

STUART, J.—The defendant was indicted in the *Perry* Circuit Court for the murder of *James B. Jagers*; tried and convicted of murder in the second degree; and sentenced to the penitentiary for life.

At the proper time a motion for a new trial was interposed and overruled; exception was taken; and the evidence was made part of the record.

The only question of importance, claiming consideration, arises on the motion for a new trial.

The motion was predicated on the affidavit of the defendant that he was surprised by the evidence of one *Horne*, a witness for the state, who testified to a threat made by the prisoner eighteen months before the alleged murder, that "if *Jagers* ever crossed his path or insulted him, he would kill him;" that this statement of *Horne* is false, and that if a new trial be granted he can prove it so by certain persons named; that he had been in confinement ever since the death of *Jagers*, and had no opportunity to prepare, and no means wherewith to employ counsel; that the defence was made by counsel assigned him when the case was called for trial, who knew nothing of the circumstances except as they were developed in the evidence, &c.

The defendant and *Jagers* were both drunk at the time of the homicide. They fought several times, and the prisoner got the worst of it. Almost the only evidence of what took place is what the prisoner relates himself; and it appears that he was too drunk to have a very clear idea of what did happen. Between the encounters the prisoner was seen by *Miller*, who testifies that his face was bloody, the hair torn down over it, his shirt torn, &c. He was in

a violent rage, inquiring for a gun, and threatening vengeance on *Jagers*. He then returned to his house, where *Jagers* was, when, as the prisoner relates it, they had another encounter; that *Jagers* had him down, and had the fire-shovel, which the prisoner, in the struggle, got from him, and with it killed *Jagers*.

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ROSENCRANTS
V.
THE STATE.

We are of opinion that on this state of facts the prisoner was entitled to a new trial. Without the evidence of *Horne*, the case is not one of very great aggravation. Aside from what *Horne* testifies, there is no evidence of premeditated malice. The position of the prisoner, in jail, without counsel and without means to employ such aid, is to be considered. It was not in his power to know what case the state would make against him, or by what witnesses. If it could be shown that he was aware that *Horne* was to be a witness, and knew what he would testify, it might possibly give the case a different aspect. In such circumstances his course would have been to file an affidavit for a continuance, to procure witnesses to impeach or contradict *Horne*, if he had not the means ready at hand to do so. If with such knowledge before trial, he failed to make the application for a continuance, his application for a new trial, for the same reason, would have come too late.

Such an affidavit before trial would have entitled him to a continuance, within the ruling in *Spence v. The State*, 8 Blackf. 281. Accordingly are *Gross v. The State*, 2 Ind. R. 135.—*Lindville v. The State*, 3 *id.* 580.

The crime is alleged to have been committed on the 11th of *October*, 1854. The bill was found *November* 21, 1854, and the prisoner was immediately put on trial, as appears from the *jurat* of the affidavit, which is dated *November* 23, 1854.

In view of all the facts, we think the new trial should have been granted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Pücher, for the appellant.

D. C. Chipman, for the state.

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1855.

PEOPLES and Others v. STANLEY.

PEOPLES
v.
STANLEY.

Bill in chancery under the R. S. 1843. Some of the defendants were notified of the pendency of the suit, as non-residents, by publication, and a decree was taken against them by default. No affidavit of their non-residence was made. A guardian *ad litem* was appointed for other defendants, who were minors, and a decree was taken against them; but it was not shown that they had any notice of the suit, by service of process or otherwise. *Held*, that the Court had not acquired jurisdiction of the persons of the defendants mentioned, and that the decree against them was, consequently, erroneous. A Court of equity cannot appropriate choses in action of a debtor to the payment of a demand of a creditor.

Monday,
June 11.

ERROR to the *Marshall* Circuit Court.

DAVISON, J. — *Stanley*, on the 6th of *June*, 1850, sued *Hugh A. B. Peoples*, *Thomas Skilman*, *John Fisher*, *John Jones*, *Alvin Kite*, and *Orange Fisher*, in chancery, in the *Marshall* Circuit Court.

The bill states these facts:

Peoples and *Skilman*, as sureties for *Jones* and *Kite*, became indebted to *Stanley* 600 dollars. *Jones*, *Kite* and *Skilman* were insolvent. *Peoples*, with intent to defraud *Stanley*, and evade the payment of said debt, which was then in judgment, placed a certain amount of money in the hands of *John Fisher*, and directed him to lay it out in canal land, and take the title in his, *Fisher's*, name. In pursuance of this arrangement, *Fisher* went to the land-office at *Logansport*, and purchased a quarter-section of land in *Marshall* county. After this, *Peoples*, with his family, moved upon said land, improved it, and resided thereon until the month of *March*, 1850, when he and *Fisher* left the state, with the avowed intention of going to *California*. When *Fisher* bought the land, he obtained a certificate of purchase, which, before he started to *California*, he assigned to *Patsey Peoples*, the wife of the said *Hugh Peoples*, and she, the said *Patsey*, remained in the occupancy of the land, and also in the possession of personal property belonging to her husband, worth 500 dollars. It appeared that, within a few days after their departure for *California*, *Patsey Peoples* died, leaving *William*, *George*,

Daniel, Mary and Samuel Peoples, her heirs at law, they being minors and the children of the said *Hugh and Patsey*. These children, by amendment of the bill, were subsequently made defendants. After the death of *Patsey*, the property left with her was sold by the said *Orange Fisher*, who, in making the sale thereof, acted without authority, and took notes for the purchase-money, payable to himself at six months. The bill alleges that *Hugh A. B. Peoples* and *John Fisher* are non-residents, and prays the appropriation of the notes in the hands of *Orange Fisher*, and also the above land, to the payment of *Stanley's* claim, and for general relief, &c.

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PEOPLES
v.
STANLEY.

The record shows that *Peoples* and *John Fisher* were notified by publication, and defaulted; though an affidavit of their non-residency does not appear to have been made. It is alleged that the minor defendants answered by guardian *ad litem*; but it is not shown that they had any notice of the suit, or that any steps, by process or otherwise, were taken to notify them of the proceeding. The other defendants, (except *Orange Fisher*, who answered,) were served with process, and defaulted.

The Court, upon final hearing, directed the notes taken for the sale of the personal property by *Orange Fisher*, (which had been brought into Court,) to be collected, and the proceeds to be applied to the payment of *Stanley's* claim, which was adjudged to be 596 dollars; and for the payment of the balance, if any, after the application of such proceeds, the land was ordered to be sold.

This decree, in our opinion, can not be sustained—

1. Because the notice by publication against *Peoples* and *Fisher* does not appear to have been preceded by an affidavit of non-residency. Without such affidavit, we think the notice was insufficient, and, consequently, they were not properly before the Court. A provision of the R. S. 1843, in force at the time of these proceedings, points out the mode in which a non-resident party may be notified of the pendency of a suit, and expressly requires that such notice shall be upon affidavit. R. S. 1843, p. 833.

2. It is not shown that the minor defendants were served

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v.
VESTAL.

with process, or notified of the suit in any mode known to the law. This Court has repeatedly decided that process should be served on infant defendants, in chancery, in the same manner as if they were adults. *Hough v. Canby*, 8 Blackf. 301.—*Robbins v. Robbins*, 2 Ind. R. 74.

3. A Court of chancery has no power to appropriate choses in action in payment of a creditor's demand against his debtor, whether such demand be in judgment or otherwise. This point is decided in *Shaw v. Aveline*, 5 Ind. R. 380; and also in *Stewart v. English*, ante, p. 176.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. B. Niles and W. G. Pomeroy, for the plaintiffs.

NEWBY v. VESTAL.

It is the province of the jury to reconcile conflicting testimony; and their finding thereon will not be disturbed, unless it is in violation of some principle of law.

An action for use and occupation is founded on a contract, express or implied, and lies only where the relation of landlord and tenant exists between the parties.

In a suit for use and occupation, proof that the relation of vendor and vendee exists between the parties, rebuts every implication of a promise by the defendant to pay rent.

Instructions may properly be refused which are not pertinent to the evidence.

Monday,
June 11.

APPEAL from the *Henry* Court of Common Pleas.

DAVISON, J.—Assumpsit by *Newby* against *Vestal*, for use and occupation. Verdict for the defendant. New trial refused, and judgment on the verdict.

Upon the trial it was proved that the plaintiff owned a house in the town of *Cadiz*, *Henry* county, which the defendant had used and occupied for the space of two and one-half years, and that the rent of said property was worth 2 dollars a month. This was sufficient to sustain the plaintiff's case. But, in defence, the defendant set up that he had entered upon and so occupied the premises

under a contract of purchase from the plaintiff, and was not, therefore, liable to pay rent. Upon this point the evidence was, to some extent, conflicting; but it was the province of the jury to reconcile it, and the verdict indicates their decision, that the premises, during the time for which rent was claimed, were occupied by the defendant as a vendee, and not as a tenant. Such finding can not be disturbed, unless some principle of law has been violated.

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VESTAL.

An action for use and occupation is founded on a contract, express or implied, and lies only where the relation of landlord and tenant exists. If, however, another relation existed between the parties, namely, that of vendor and vendee, every implication of a promise to pay rent for the premises is necessarily rebutted. *Croswell v. Crane*, 7 Barb. (N. Y.) R. 191.—*Brewer v. Craig*, 3 Harr. 214.

At the proper time, the defendant moved the Court to instruct the jury as follows:

"1. If the plaintiff promised the defendant, when he took possession of the house, that he would let him ultimately have the property on his paying for it, still, unless the defendant offered to comply on his part, the plaintiff would have the right, after the defendant had voluntarily left the house, to recover for use and occupation.

"2. If such a contract as could have been enforced existed between the parties, but the defendant voluntarily abandoned the property, after occupying it two and one-half years, and refused to perform the contract on his part, the plaintiff has a right to recover rent for the use of the premises."

Whether, in the abstract, these instructions involve a correct exposition of the law, is a question not properly before us. They were not pertinent to the evidence, and, on that ground, were correctly refused. There is nothing in the record from which it can be inferred that the defendant voluntarily left or abandoned the premises, nor is it shown that he refused to perform his contract. Indeed the evidence tends to show that he removed from the house because the plaintiff refused to fulfil his engagement respecting the property.

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1855.

NOBLE
v.
EPPERLY.

Per Curiam.—The judgment is affirmed with costs.

W. Grose, for the appellant.

J. T. Elliott and J. H. Mellett, for the appellee.

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167 532

NOBLE v. EPPERLY.

In replevin, the plea of *non detinet*, under the R. S. 1843, put in issue, not only the detention of the goods, but also the property of the plaintiff therein.

In replevin, the plea of property in the defendant imposes upon the plaintiff the burden of proving property in himself.

The plaintiff in replevin, to maintain his action, must prove a right to the immediate possession of the goods. Proof of a joint ownership with the defendant, therefore, as a partner, or the like, is not sufficient.

Monday,
June 11.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—Replevin, under the old practice, against *Epperly* and *Kane*, for a number of kegs of lard. Pleas, *non detinet*, and property in the defendants. Replication to the second plea, reaffirming the allegation in the declaration of property in the plaintiff, and denying property in the defendants.

The issues were submitted for decision to a jury. Verdict for the defendants. A new trial was denied.

The evidence in the case tended to show that the lard belonged to *Noble*; that it belonged to *Noble* and *Kane*; and that it belonged to *Noble*, *Kane* and *Epperly*. Assume the hypothesis that it belonged to the one or the other of the three parties named, and portions of the evidence would support it. In regard to which of them the hypothesis was best supported, in point of fact, was for the jury to determine. In such a state of the case, it is manifest the only questions that can arise for the consideration of this Court must be upon the instructions and rulings of the Court below.

The plaintiff asked the Court to say to the jury, that—

“1. If *Noble* and *Kane* entered into an agreement by which *Noble* was to furnish the capital stock and materials for steaming lard from hogs’ heads and the offals, and *Kane* was to give his personal attention and labor in the business; and further, if, by said agreement, *Noble* was first to have the amount of his advances paid, and then expenses, transportation, &c.; and after these were paid, the profits of the business were to be divided between them; no partnership existed in anything but the profits, and *Kane* had no right to hold the lard from *Noble*, after a demand made.

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“2. If by the agreement between *Noble* and *Kane*, *Kane* had only a community of interest in the profits, and not in the capital stock, no partnership existed between them, and *Kane* had no right,” &c.

3. The third instruction is but a reassertion of the same principle already stated in instructions 1 and 2.

“4. The plea of *non detinet* admits the property in *Noble*, and simply denies the detainer.

“5. The plea of property in the defendants must be substantially proved as pleaded, and these being the only pleas, if the detention has been proved, and the defendants have not proved the property in themselves as pleaded, the jury should find for the plaintiff.”

The Court refused these instructions in a body, but gave, in its general charge, the substance of the first three, and hence, as to them, no opinion is required from us.

The fourth instruction asked did not express the law; for, by the R. S. 1843, s. 178, p. 701, it was enacted that the plea of *non detinet*, in replevin, should put in issue, not only the detention of the goods, but also the property of the plaintiff in them.

The fifth instruction asked was wholly wrong. The plea of property in the defendants, and not in the plaintiff, put in issue the property of the plaintiff, and threw upon him the burden of proving it; and it was immaterial in whom the property was shown to be, so that it was not in him. 2 Greenl. Ev., p. 466.—*Simcoke v. Frederick*, 1 Ind. R. 54.

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And, we may remark, the plaintiff in replevin must prove such a right in himself as will entitle him to the immediate possession of the property replevied, or his action must fail. Hence, proving him to be a joint owner with the defendant simply, as, for example, in the character of a partner, would not be sufficient; for one partner could not, simply upon the strength of that relation, recover the possession of the joint property from his co-partner.

The case seems to have been fairly submitted to the jury, the evidence tends to sustain the verdict that was rendered, and we can not say the Court below erred in refusing a new trial.

Per Curiam.—The judgment is affirmed with costs.

J. Rariden, J. Perry, J. S. Newman and J. P. Siddall, for the appellant.

O. P. Morton, C. H. Test and M. Wilson, for the appellees.

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6	416
151	615
151	617
6	418
157	809

A judgment will not be reversed on account of the improper admission or rejection of testimony, if the testimony could not have had any material influence.

A witness was admitted to testify, while the R. S. 1843 were in force, whose competency was objected to on account of interest. The extent of the interest of the witness was stated by the Court to the jury. The R. S. 1852 having taken effect during the pendency of the writ of error, *held*, that the interest of the witness furnished no ground for a reversal of the judgment.

A party who, by cross-examining a witness as to facts and circumstances not connected with the matters stated in his direct examination, elicits evidence to his prejudice, can not afterward object that such evidence was inadmissible.

Suit against the proprietor of a steamboat for negligence in towing a flat-boat, by which the cargo of the flat-boat was sunk and greatly damaged. There was evidence tending to show that the flat-boat had been unskillfully loaded, so as to render the towing more hazardous; but that the defendant was apprised of the fact, and that the immediate cause of the injury was the gross

carelessness of the defendant, in towing the boat at an improper speed. It was also shown that the plaintiffs agreed in writing that the flat-boat should be towed at their risk.

Held, that, without the writing, the defendants were liable for the injury.

Held, also, that the writing did not exempt the defendants from liability for gross negligence.

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ERROR to the *Dearborn* Circuit Court.

Monday,
June 11.

PERKINS, J.—Trespass on the case by *Gaff* and *Gaff* against *Wright*, captain of the steamboat *Wisconsin*, for negligently towing a flat-boat loaded with corn, whereby loss accrued. Plea, the general issue. Trial by jury. Verdict for 300 dollars. Motion for a new trial overruled, and judgment on the verdict.

The testimony given on the trial is spread upon the record, and, as to the main facts of the case, is without conflict.

The flat-boat was loaded with about three-fourths of a full load of corn, at *Florence*, on the *Ohio* river, by one *Mitchell*, who had the boat in charge for the *Gaffs*; was taken in tow by the steamer *Wisconsin No. 2*, for *Aurora*, a port up the *Ohio* from *Florence*, and was towed by said steamer a portion of the distance, when, the flat-boat having become filled with water and commenced sinking, it was run ashore and left. The flat was a good sound boat. It was loaded heavier at the stern than at the bow, and all the witnesses agree that it should have been; but there is a conflict among them upon the point whether it was not too heavily loaded in that part.

A flat-boat properly loaded, say all the witnesses testifying upon the point but one, may be towed with safety from two to four miles an hour, according to the state of the river. One of the defendant's witnesses goes up to five or six miles an hour for the highest speed. In this case, the river was high, rough, and rapid, and the towing was up stream, against the current; and, says *Dunning*, the principal witness of the defendant and the only witness in the case who gives the speed of the steamer, was at the rate of from seven to eight miles an hour. The boat was towed for hire.

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The defendant put in evidence the following agreement: "December 20, 1850. Steamer *Wisconsin* No. 2 agrees to tow one corn-boat from *Florence* to *Aurora*, for T. and J. W. Gaff, at their risk, to which the undersigned, agent, agrees. R. H. Mitchell, for T. and J. W. Gaff." And examined said Mitchell, who had been introduced by the plaintiff to testify to a few points that were fully covered by other witnesses, touching the execution by him of said contract, his power to make it, &c.; which examination, with the cross-examination of the plaintiff on the point, tended to show that said writing was obtained from the witness, Mitchell, by fraud.

The defendant, captain Wright, examined the flat-boat before he took it in tow, objected that it was too heavily loaded astern, but nevertheless took it.

A flat-boat in tow is entirely under the control of the mate of the towing steamer.

If the finding for the plaintiff was right, the amount of damages assessed is not objectionable, under the evidence.

The Court suppressed the following in Vaughan's deposition, because it was hearsay. "I hallooed down to the watchman, and asked him if he thought he was gaining any on the water. He answered back to me that the water was gaining still in the boat faster than he could throw it out." These facts were proved, however, by other witnesses.

The Court permitted a witness for the plaintiff to state that a hand on the steamboat said he believed he would run the flat-boat against a snag and sink her. A witness of the defendant explained that the hand said he would not care if they sunk her, &c.

It is objected that the extract from Vaughan's deposition should not have been suppressed, and that the statement of the hand about snagging the boat should not have been rehearsed to the jury.

Mitchell, as we have stated, was examined touching certain matters by the plaintiff. It is objected that he was an interested witness, and that questions to him were put in a leading form. His interest is asserted to arise from the

fact that he was the servant of the *Gaffs* in loading the flat-boat, and might be liable to them if she was improperly loaded whereby loss happened.

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As to the correctness of the rulings of the Court in rejecting the first and admitting the second of the above-mentioned items of evidence, and in admitting the testimony of *Mitchell*, in answer to the questions as propounded, or at all, we shall make no inquiry; for the testimony, admitted or rejected, could not materially affect the case, as will be seen in the progress of this opinion; and such being the fact, a reversal could not be obtained on account of it. *Parker v. The State*, 8 Blackf. 292.—2 Swan's Pr. 926.—*Stoddard v. The Long Island Railroad Company*, 5 Sandf. (N. Y.) R. 180.

And as to the testimony of *Mitchell*, we may further remark, that now, by statute, he would at all events be a competent witness. His interest, if such he had, would go only to his credibility. Such was precisely the situation of the witness as he stood before the jury on the trial which has been had, for the Court instructed that if he improperly loaded the boat, thereby occasioning loss, he would be liable to the *Gaffs*. No reason, therefore, can exist for a reversal of the judgment on account of the admission of *Mitchell* as a witness.

The defendant below contends, however, that a portion of his testimony went to contradict and invalidate the written instrument signed by him, and, for this reason, should have been excluded; but the answer to this position is, that the objectionable testimony, if such it was, was called out by the party objecting to it. The plaintiffs, in their examination in chief, made no allusion to the written contract, and nothing was said by the witness about it or its contents; and had the defendant limited his cross-examination to the matters of the original, no testimony would have been elicited touching the writing in question. But the defendant did not so limit his cross-examination. He proceeded to examine the witness upon divers new topics, the writing copied above being one, thus making the witness, as to such examination, his own,

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and he can not now complain, nor could he below, of testimony voluntarily given to the jury by himself. In *The Philadelphia, &c., Railroad Co. v. Stimpson*, 14 Peters 448, says *Story*, justice,—“The principle is now well established, although sometimes lost sight of in our loose practice at trials, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause.” Here, instead of calling him subsequently, the defendant proceeded to the examination, upon new topics, on the cross-examination; but the testimony so elicited was his own.

These preliminary points being disposed of, we are prepared to advance to the meritorious questions in the cause.

According to the great preponderance of evidence, no loaded flat-boat could have been towed with safety, in the then state of the river, more than four miles an hour; yet it is proved that the one in question was towed from seven to eight miles an hour till it commenced sinking. Here, then, is a clear omission to use ordinary care—a clear case of gross negligence—in a matter sufficient to cause the loss that happened; and the question is, does anything appear in the record that will exempt the steamboat, guilty of the negligence, from liability?

Counsel assume that the flat-boat was not properly loaded, and then take the position that the loss happened in part from that cause, which, being the fault of the owners of the flat-boat, precludes their right of recovery. Conceding that the flat-boat was not skilfully loaded, still the fact contributed but remotely to the result that occurred. The owners of the flat-boat were guilty of no negligence after the steamer took it in charge; all the carelessness immediately connected with the loss was upon the part of the steamer. It can not be shown that, in the absence of that carelessness, the loss would have happened, and the steamer can not escape from responsibility for her own wrongful acts, upon a conjecture that

the like consequences might have resulted without them. The immediate cause of the loss was the wrongful act of the steamer, and for it she must be liable, unless other facts in the case will exempt her. *Wright et al. v. Brown*, 4 Ind. R. 95, and the cases there cited.

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It is claimed that there is one other fact appearing which will work the exemption, viz., the agreement of the agent, *Mitchell*, that the flat-boat should be towed at the risk of the owners. To this point we turn our attention, and shall first address ourselves to the question as to the effect to be given to the contract to transport at the owners' risk. Did that contract release the steamboat from the obligation to use ordinary care in the transportation? In a like case, *Alexander v. Greene*, 3 Hill (N. Y.) R. 9, such a contract was held to go to that extent, on the ground that the towing boat was not to be treated as a common carrier. That case was decided in 1842, by the Supreme Court of *New-York*, and was forthwith incorporated into the elementary treatises as law. But in 1844 the case was reversed in the Court of Errors of the same state, by a vote unanimous save one, and the contract held not to exempt from reasonable care, even though the boat should not be regarded as a common carrier; 7 Hill 553; the profession, in the meantime, having been misled by a "late case." And in 1848 the question was put at rest by the Supreme Court of the *United States*, in *The New-Jersey Steam Navigation Co. v. The Merchants' Bank of Boston*, 6 How. 344, in which case a decision was made precisely in harmony with that of the *New-York* Court of Errors. A like decision was made by the Superior Court of *New-York* city, in 1851. *Stoddard v. The Long Island Railroad Company*, 5 Sandf. 180.

The question was made and argued, as we have seen, in *Alexander v. Greene*, *supra*, both in the Supreme Court and Court of Errors, whether those engaged in towing canal and flat-boats, as in the case now before this Court, were common carriers. In the Supreme Court it was held that they were not; but in the Court of Errors six senators delivered opinions, four holding that they were, and

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two the contrary, and the Court left the question undecided. *Lawrence*, senator, after quoting from and commenting on *Smith v. Pierce*, 1 Louis. R. 349, a case in which towing-boats are held common carriers, concludes his opinion thus:

"The case of *Adams v. The New-Orleans Steam Tow-Boat Co.*, 11 Louis. R. 46, is one confirming the previous decision made in *Smith v. Pierce*. In *Sproul v. Hemmingway*, 14 Pick. R. 1, the Supreme Court of *Massachusetts* admit the correctness of the doctrine laid down by the Courts of *Louisiana*. And judge *Story* sustains the same view of the question in strong and emphatic terms. *Story* on Bailment, s. 495, 1st Ed., a. [To the same effect is *Vanderslice v. The Steam Tow-Boat Superior*, in the *Pennsylvania* District Court of the *United States*, decided in 1850.—*Angell on Carriers*, 2d Ed., p. 673, note.] I consider it useless to multiply authorities on this point. It is a fact which can not be controverted, that their weight is on the side of making the defendants liable as common carriers. Public policy and public safety require it."

Subsequently, in 1849, the question arose again in *Wells and Tucker v. The Steam Navigation Company et al.*, in the *New-York* Court of Appeals, 2 Com. 204, when *Bronson*, J., who delivered the opinion in 3 Hill, *supra*, which was set aside in 7 Hill, *supra*, thus describes this latter case:

"But what particular point or principle of law was decided by the Court, or what a majority of the members thought upon any particular question of law, no one can tell. It appears by the reporter's head-note that he could not tell; and from his note at the end of the case, it is apparent that the Court itself could not tell. Two merchants and two lawyers thought the defendants were common carriers, while other senators expressed a different opinion, and went upon other grounds; and it does not appear that more than four of the seventeen senators who voted for the reversal were agreed concerning any one of the questions in the case. Two efforts were made at the time to ascertain 'the ground of the judgment;' but both proved abortive; and thus the majority virtually said, that

although the judgment was reversed, no point or principle of law was settled by the decision. It happened in that case, as it has happened on other occasions, that a majority of the members of that multitudinous Court made up their minds to reverse a judgment, and they did it; but not being able to agree concerning the ground of their action, they plainly enough admitted that nothing was settled by the decision. The case is not authority for anything." And the Court proceed to reaffirm the doctrine in 3 Hill, that towing steamers are not to be treated as common carriers.

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This question has been raised and discussed by counsel in the present case also, and it is one of importance, which can not fail to require a determination from this Court, sooner or later, as the business of towing is considerably practised upon our western waters. Hence, we have felt justified in noting the decisions that have been made upon it, though a necessity for deciding it does not now exist, the steamer in this case being liable for gross negligence, independently of her character as a common carrier.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

D. S. Major and A. Brower, for the plaintiff.

E. Dumont and W. S. Holman, for the defendants.

HUNTER v. THE STATE.

An appeal cannot be taken from the judgment of a Court imposing a penalty for a contempt, unless the appeal is specially authorized by statute.

There is no statute in force in this state which allows an appeal in such cases, unless, possibly, a statute in relation to an appeal by attorneys; and that seems not to be in existence.

Semble, that, in the absence of any special statutory provision, the modes of redressing the parties' own wrongs and punishing the infictors of them, in cases of contempt, are, 1. By *habeas corpus*, in which a void commit-

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June 11.

ment for a contempt will be disregarded, and the party discharged from custody. 2. By impeachment of the judges wrongfully exercising the power. 3. Perhaps by civil suit against those concerned in inflicting the wrong.

APPEAL from the *Lawrence* Court of Common Pleas.
PERKINS, J.—Contempt of Court. Defendant fined.
Appeal to this Court.

The bill of exceptions states the case thus: "Be it remembered that *Lewis Rodgers*, having been duly sworn, stated to the Court, on an examination in order to purge himself of a contempt of said Court, for not appearing at the last term of said Court to testify in certain cases therein pending, for maintaining a nuisance and for retailing, against said *John Hunter* and others, that said *Hunter* told witness not to come to Court; that if he was fined for not attending, it should not cost him anything; that said *Hunter* told him, witness, to keep out of the way; that if witness came to Court, he, said *Hunter*, would have him put in jail; that said *Hunter* told witness to leave the county; and that the statements made by said *Hunter* to him induced said witness to stay away from said Court, at the last term thereof. And the said *Hunter*, being in Court at the time, the Court asked him what he had to say about the matter. Said *Hunter* answered that he did not know that said witness was a witness against him, but did not admit or deny the statement made by the witness, *Rodgers*; and the Court having assessed a fine of 50 dollars against said *Hunter*, for contempt of Court in thus attempting to keep said witness, *Rodgers*, from attending said Court to testify against said *Hunter* in the aforesaid cases, the defendant, by his counsel, excepts," &c.

The appellant objects to the fine inflicted upon him, and to the mode in which he was prosecuted.

But a preliminary question arises as to the right of appeal to another tribunal in a case of contempt.

In 1822 the point was before this Court for adjudication, in the case of *The State v. Tipton*, 1 Blackf. 166, and in giving their decision the Court say: "It is the opinion of this Court, that in these cases we have no jurisdiction.

Courts of record have exclusive control over charges for contempt; and their conviction or acquittal is final and conclusive. This great power is entrusted to these tribunals of justice, for the support and preservation of their respectability and independence; it has existed from the earliest period to which the annals of jurisprudence extend; and, except in a few cases of party violence, it has been sanctioned and established by the experience of ages. *The Lord Mayor of London's case*, 3 Wils. 188.—Opinion of C. J. Kent, in the case of *Yates*, 4 Johns. R. 354.—*Johnston v. The Commonwealth*, 1 Bibb 598.”

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But in 1843 the legislature enacted, (sec. 114, R. S., p. 664,) that—

“In all proceedings against an attorney and counsellor at law, wherein a judgment of any kind for a contempt or official malconduct shall be rendered against him, he may prosecute an appeal or writ of error to the Supreme Court of the state, subject to the same regulations and restrictions as are provided in regard to actions at law.” See *Engle v. The State*, 8 Blackf. 574.

And in 1848 a case occurred which occasioned the giving of a construction to this section of the statute by the Supreme Court. The construction was, that the section applied only to cases where a lawyer had “been adjudged guilty of a contempt for some misconduct in his office.” The Court add: “In the present case, the party’s offence related not to any official act, but to his conduct as a witness;” and say that they have no jurisdiction in cases of that kind, citing *The State v. Tipton*, *supra*.—*Lockwood v. The State*, 1 Ind. R. 161.

Were the foregoing statutory provision still in force, therefore, as it applies to attorneys alone, it would not save the case now before us; but even the existence of that provision is doubtful. We have looked, with some care, through the statutes of 1852, and can find no section specially authorizing an appeal in cases of contempt, and the general provision authorizing appeals in all suits, &c., is not construed to embrace this class of cases, for we had such a provision when the decisions in 1822 and in 1848,

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above cited, were made; and, further, a writ of error is a writ of right at common law, except in capital cases, in *England* those of treason and felony; Petersdorff, vol. 9, p. 3; and, hence, was always demandable in this state, prior to the late code, in cases where such a writ would lie, as the common law has at all times been in force here since 1807, modified in some particulars, it is true, but in none affecting the right to a writ of error.

Without the aid of a special statutory provision, the modes of redressing the parties' own wrongs and punishing the inflictors of them, in cases of contempt, would seem to be, 1. By *habeas corpus*, in which a void commitment for contempt will be disregarded, and the party discharged from custody. *Ex parte Alexander*, 2 Am. Law Register, 44.—*Cyrus Wilson's case*, 53 Eng. Com. Law Rep., 984. 2. By impeachment of the judges wrongfully exercising the power. Case of the impeachment of the judges of the Supreme Court of *Pennsylvania* in 1807, reported by *William Hamilton*, and that of judge *Peck* by the *United States* house of representatives in 1831, reported by *Arthur J. Stansbury*, in which cases the law on the subject of contempts of court is most thoroughly discussed and fully presented. 3. Perhaps by civil suit against those concerned in inflicting the wrong.

The appeal in this case must be dismissed for want of jurisdiction, and without costs.

Per Curiam.—The appeal is dismissed.

S. W. Short, *H. C. Newcomb* and *J. S. Harvey*, for the appellant.

D. C. Chipman and *J. W. Gordon*, for the state.

MERRILL v. WILSON.

If an agent in dealing with a third person does not disclose his agency, he will be held liable as a principal.

ERROR to the *Marion* Court of Common Pleas.

GOOKINS, J.—This cause originated before a justice of the peace, where *Wilson*, the plaintiff below, had judgment, from which *Merrill* appealed. Trial by the Court, finding for the plaintiff, motion for a new trial overruled, and judgment.

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v.
WILSON.

Tuesday,
June 12.

The record contains all the evidence, from which it appears that a subscription had been taken for the purpose of building a house for *Mrs. Olive*, a widow, whose husband had been killed on the *Madison* and *Indianapolis* railroad; that *Merrill* was the active man in collecting the subscription, and in disbursing it in the erection of the house. On the 15th of *May*, 1848, he sent the following order to the plaintiff, who had a saw-mill on the railroad, near *Edinburgh*, in *Johnson* county: "*A. Wilson*: Please furnish for *Mrs. Olive* six oak posts;" and on the 20th of *May*, the lumber not having arrived, he wrote to the plaintiff as follows: "*Mr. Wilson*: If you possibly can, please send up the bill of lumber for the widow on *Monday*, as I wish to have her house commenced immediately. You may add, if you please, what will make two sills thirty feet each, and two end sills fifteen feet each; also, two plates thirty feet long. *May 20*. Yours, *S. Merrill*." The lumber soon after arrived, and was applied to the use for which it was ordered. It came loaded on a car, with other lumber of *Wilson*, on which freight was charged; but no freight was paid on that which was designed for *Mrs. Olive's* house.

The plaintiff in error insists that this evidence shows that the lumber was ordered for *Mrs. Olive*, and not for himself; but we do not think so. It is true the first order requests *Wilson* to furnish a portion of the lumber "for *Mrs. Olive*." It is very commonly the case that an order for goods shows that they are designed for some other person than the drawer. An agent must disclose his agency to the person with whom he deals, otherwise he will be held liable as a principal. Possibly it may be inferred from the language of the orders, that *Wilson* had some knowledge of the benevolent object in which *Merrill* was

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engaged, but there is nothing to justify the inference that he was expected to furnish the lumber as a gratuity, nor that he gave credit to any other person than *Merrill* for it. The fact that the lumber was carried free of charge shows that the railroad company contributed to the object, but does not strengthen the defence.

The judgment, however, must be reversed. The plaintiff offered no proof of the value of the lumber.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. L. Ketcham, for the plaintiff.

McKERNAN v. HITE and Another.

To render the assignment of a patent valid, under the act of congress approved July 4, 1836, it is not essential that it shall have been recorded.

Tuesday,
June 12.

APPEAL from the *Grant* Court of Common Pleas.

GOOKINS, J.—*McKernan*, as the assignee of *Parker*, brought an action before a justice of the peace, against *Hite* and *Inman*, on a promissory note. On appeal to the Common Pleas there was a trial and judgment for the defendant.

The defence set up was, that the note was given to compromise a claim set up against the makers, for the infringement of a patent right which *Parker*, the payee, alleged he held as assignee; and that his deed of assignment had not been recorded.

It was proved on the trial that the person who took the note from the makers, represented himself to be *Parker's* agent; and that he threatened to sue them for an infringement of the patent; and that the note was given to settle the controversy. The deed of assignment to *Parker* was proved; but there was no evidence that it had been recorded.

It was held by this Court in *Higgins v. Strong*, 4 Blackf. 182, that under the 4th section of the act of congress of February 21, 1793, the recording of the assignment of a patent, in the office of the secretary of state, was essential to the validity of the assignee's title. See also *Mullikin v. Latchem*, 7 Blackf. 136. The language of that statute is as follows: "And the said assignee, having recorded the said assignment in the office of the secretary of state, shall thereafter stand in the place of the original inventor, both as to right and responsibility, and so the assignee of assigns, to any degree." 1 U. S. Statutes at Large, 322, sec. 4.

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That act is repealed by an act approved July 4, 1836, the 11th section of which is as follows: "Every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by an instrument in writing; which assignment, and also every grant and conveyance of the exclusive right, under any patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout any specified part or portion of the *United States*, shall be recorded in the patent office, within three months from the execution thereof." 5 U. S. Statutes at Large, 121.

We are not aware that any construction has been put upon this section by the Supreme Court of the *United States*; but the Circuit Court has in several cases held that recording was not essential to the validity of the assignee's title. *Pitts v. Whitman*, 2 Story's R. 609.—*Boyd v. McAlpin*, 3 McLean 427.—*Case v. Redfield*, 4 *id.* 526. By the former act the assignment was not operative for any purpose, until recorded. By the latter, it would be valid for three months at least, without recording; and we know of no principle upon which a legal title, once vested, would, as between the immediate parties, be divested by an omission to put the deed upon record. In *Boyd v. McAlpin* the doctrine of notice of an unrecorded conveyance was said not to apply, and that a subsequent assignee who first had his assignment of the same right recorded, would have priority, whether he had notice of the previous assignment or not. If that rule prevails, it will

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relieve the subject of much difficulty which would otherwise result from the vending of patent rights throughout so large a territory as the *United States*. No doubt there are great facilities for imposition in the sale of these rights; and the subject ought to be so guarded as that the people may generally avail themselves of inventions and improvements which are really valuable, and at the same time be protected, as far as may be, from fraud and imposition. We do not see that the subject is susceptible of any greater degree of certainty than would be furnished by reference to the records of the patent office, where the prior record would show the prior right, to which the purchaser might always refer before buying. Upon general principles, as we have said, the assignment, without recording, would transfer the right; and we do not see any sufficient reason for not applying the principle here.

The Court erred in holding the assignment void without evidence that it had been recorded, and the judgment must be reversed.

Per Curiam.—The judgment is reversed. Cause remanded, with instructions to the Court of Common Pleas to grant a new trial, with costs to abide the event of the suit.

D. Kilgore and *J. Brownlee*, for the appellant.

J. M. Wallace, for the appellees.

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Where the verdict is supported by the weight of evidence, it is immaterial what instructions the Court gave to the jury.

In trespass before a justice of the peace, under the R. S. 1843, the damages laid in the conclusion of the declaration constitute the amount of the plaintiff's claim, in determining the justice's jurisdiction.

Tuesday,
June 12.

ERROR to the *Whitley* Circuit Court.

STUART, J.—*Scott* sued *Short* in trespass, before a magistrate. Trial by the justice, and judgment for the defen-

dant. *Scott* appealed to the Circuit Court, where there was a trial by jury, and a verdict and judgment for *Scott* for 25 dollars. Motion for a new trial, made at the proper time, overruled, and the evidence made part of the record by bill of exceptions.

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From this evidence we are satisfied with the verdict. Hence, the verdict being right on the weight of evidence, the law of the case as given by the Court to the jury is wholly immaterial. *Muirhead v. Snyder*, 4 Ind. 486.—*Rogers v. Maxwell*, *id.* 243.

But there is another question in the case not free from difficulty. It relates to the jurisdiction. The cause of action contains three counts. The first is for killing a dog of the value of 45 dollars. The second is for killing a deer of the value of 5 dollars. The third is for killing a certain other dog of the value of 45 dollars, concluding with *alia enormia* against the peace of the state, and to the damage of the plaintiff of 50 dollars. The jurisdiction of justices, under the law then in force, was limited thus: In actions of tort, wherein the damages demanded, or the value of the property claimed did not exceed 50 dollars. R. S. 1843, p. 862.

And the question is, did this cause of action show a want of jurisdiction in the justice?

In *Bainum v. Small*, 4 Ind. R. 49, the very same question was presented. There were, in that case, two counts in the cause of action, and each count concluded to the damage of the plaintiff 50 dollars. The Court held that the sum demanded being 100 dollars, ousted the jurisdiction.

Markin v. Jornigan, 3 Ind. 548, was an action of replevin. The cause of action consisted of two counts. The value of the property was laid in each count at 40 dollars. At the close of each count, damages were claimed to the amount of 20 dollars, making the entire damages laid 40 dollars, a sum within the jurisdiction of the justice. But the Court held that the value of the property claimed in the declaration was 80 dollars; and that, consequently, the Court below had no jurisdiction.

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It is to be observed, however, of this latter case, in distinction from *Bainum v. Small*, and the case at bar, that in the action of replevin the thing itself was sought to be recovered; the damages were, in most cases, merely incidental and nominal. But in trespass the only recovery that could be had was damages. In the replevin suit two pieces of property, of the joint value of 80 dollars, might have been recovered. In *Bainum v. Small*, damages to the amount of 80 dollars might have been recovered. So that there is no conflict between those cases, when the nature of the recovery is considered. 5 Blackf. 357.

In the case at bar the only damages laid are at the conclusion of the declaration. No matter what the proof might be, that is the limit of the recovery. "In assumpsit, and other actions sounding in damages the sum laid in the conclusion of the declaration constitutes the amount of the plaintiff's claim." 5 Blackf. 357. Here the sum demanded, and of course the limit of the right to recover, being 50 dollars, we are of opinion that the magistrate had jurisdiction.

Per Curiam.—The judgment is affirmed with costs.

W. March, for the plaintiff.

HANNING v. THE STATE.

A clause in section 26, p. 435, 3 R. S. 1852, was as follows: "If any person shall sell or give away intoxicating liquor to any minor, without the consent of his parent or guardian," &c., "he shall be fined," &c. An act approved March 4, 1853, entitled "an act to regulate the retailing of spirituous liquors and for the suppression of the evils therefrom," contained the following section: "All laws on the subject of retailing intoxicating or spirituous liquor heretofore enacted, are hereby repealed." *Held*, that this section repealed the clause in the R. S. 1852 above quoted.

Tuesday,
June 12.

APPEAL from the *Posey* Court of Common Pleas.

STUART, J.—Information in the Common Pleas, in the usual form, for selling spirituous liquor to *Edward White*,

a minor, without the consent of his father, *Isaac W. White*. May Term,
1855.
Plea, guilty, and fine 5 dollars.

The information is filed under the 2 R. S., section 26, p. 435 (1). It is insisted that this section was repealed upon the coming in force of the act to regulate the sale of spirituous liquors, approved *March 4, 1853*. HANNING
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In *Brosee v. The State*, the question presented was similar to this; indeed arose on the clause of the same section (section 26) relating to the giving or selling liquor to an intoxicated person. It was held that the 19th section of the act of *March, 1853*, repealed the provisions in 2 R. S., *supra*, on that subject (2). 5 Ind. R. 75.

Here the complaint, based upon a clause in the same section, relating to the sale of liquor to a minor without the consent of his parent, falls within the same rule. The two cases can not be distinguished. See *Brosee v. The State*, 5 Ind. R. 75.

The judgment of the Common Pleas can not be sustained (3).

Per Curiam.—The judgment is reversed.

T. B. Holt and *A. P. Hovey*, for the appellant.

J. P. Edson, for the state.

(1) That section is as follows :

"If any person, by himself or agent, shall sell or give any intoxicating liquor to any minor, without the consent of his parent or guardian, or shall sell or give any intoxicating liquor to any person, at the time in a state of intoxication, he shall be fined not less than five, nor more than fifty dollars, and in such prosecution, when the principal is defendant, the agent may be compelled to testify, or, when the agent is prosecuted, the principal may be compelled to testify."

(2) The 19th section is as follows:

"All laws on the subject of retailing intoxicating or spirituous liquors heretofore enacted are hereby repealed; but all offences against such laws shall be punished as if such laws had not been repealed."

(3) The judgments in the cases of *Bruner v. The State* and *Bradley v. The State*, on appeal from the *Posey* Court of Common Pleas, were reversed, on this day, for the reasons given in this case, and by reference thereto merely; the record in both those cases presenting precisely the same question with the case in the text.

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SLOAN and Others v. WHITEMAN.

SLOAN
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WHITEMAN.

6	434
134	572
6	434
130	190

To a bill of review, as a general rule, the same persons should be made parties who were parties to the proceeding sought to be reviewed; but they may be made complainants or defendants according to their interests in the matter to be reviewed.

Tuesday,
June 12.

ERROR to the *Fountain* Circuit Court.

DAVISON, J.—This was a bill of review, filed in the *Fountain* Circuit Court by *Jackson Whiteman* against *Joseph L. Sloan, John Hamilton, Mary Babb, Rose Thomas, George Thomas* and *Lucinda Thomas*, the said *Mary, Rose, George* and *Lucinda* being the heirs at law of one *William Thomas*, deceased. The object of the bill was to reverse a decree of said *Fountain* Circuit Court, rendered at its *September* term, 1838, in a suit then pending in that Court, wherein the said *Joseph L. Sloan* was complainant and *Jackson Whiteman*, the present complainant, and the said *William Thomas*, then in life, were defendants.

To the present bill there was a demurrer overruled, and a final decree given for the complainant below.

The only ground assumed in support of the demurrer is, that the heirs of *William Thomas* should have been made complainants, instead of defendants. We are not of that opinion. As a general rule, a bill of review ought to have the same parties that were to the proceeding sought to be reversed; that is, the same parties should be before the Court; but we think they may be brought into Court either as complainants or defendants, in accordance with their respective interests in the matter to be reviewed.

Per Curiam.—The decree is affirmed with costs.

D. Mace and *R. Jones*, for the plaintiffs.

W. H. Mallory, for the defendant.

HUNT v. RICE.

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1855.HUNT
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RICE.Tuesday,
June 12.

ERROR to the *Ohio* Circuit Court.

Per Curiam.—Assumpsit by *Rice* against *Hunt* for saw-logs, posts, &c., sold and delivered, &c. Plea, the general issue. Verdict for the plaintiff. New trial refused, and judgment.

It was proved that *Rice* took a pine log and a flat-boat gunnel down the *Ohio* river to a point near *Hunt's* saw-mill, where he tied them to a tree on the margin of the river, but there was no evidence tending to prove that *Hunt* received the property, or any contract, either express or implied, between him and *Rice* respecting it.

It was also proved that *Rice* took sixteen logs to *Hunt's* saw-mill to be sawed into posts; that *Rice* afterwards called at the mill and inquired for his posts, when *Hunt* replied, "I have not got your posts."

Again, it was proved that *Hunt* bought of *Rice* saw-logs at 16 cents per foot, to be delivered on the bank of the river, and to be paid for when delivered and before taken away. Under this contract sixty logs were delivered. A part of these logs were taken away by *Hunt*. *Rice* was present when they were taken, and some money was then paid to him by *Hunt*, but how many logs were taken, or what amount of money was paid, does not appear.

The above is substantially all the evidence in the cause. We think it is wholly insufficient to support the verdict, and that a new trial should have been granted.

The judgment is reversed with costs. Cause remanded, &c.

D. Kelso and *J. W. Gordon*, for the plaintiff.

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1855.

THE STATE v. MOORE.

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MOORE.

It is no objection to an indictment for an offence against a statute of a state, that the defendant is liable to punishment, for the same act, under a law of the *United States*.

Tuesday,
June 12.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—This was an indictment against *Martin Moore*, charging him with having, on, &c., at the county of *Tippecanoe*, in this state, “unlawfully and feloniously, with intent then and there to defraud one *John Mahar*, of said county, uttered and published to said *Mahar*,” &c., “as true and genuine, a certain false, forged and counterfeited instrument in writing, purporting to be a certificate of *George W. Crump*, deputy commissioner of pensions, and purporting to have been issued by the said *George W. Crump*, deputy commissioner of pensions, and commonly called a land-warrant, which said false, forged and counterfeited instrument in writing is as follows, that is to say.” Here the instrument was set out in *hæc verba*.

The Court, on motion, quashed the indictment, on the ground that the state Court had not jurisdiction.

The Court erred in quashing for that reason. Admit that the defendant would be liable to prosecution in the Courts of the *United States*, that fact will not exclude the jurisdiction of the state Courts.

Congress has the exclusive power to legislate on the subject of coining money, &c., and counterfeiting the national coin is punishable in the Courts of the *United States*; yet the Supreme Court of the *United States* has decided that state laws providing for punishing the same offence when practised in defrauding, or attempting to defraud, their own citizens, are valid; that those guilty may be punished in the state Courts for violating the state laws, and in the *United States* Courts for violating the laws of the *United States*; and that it is no objection that the individuals are thus punished twice for the same offence, the punishments being severally inflicted by separate jurisdictions. *Fox v. The State of Ohio*, 4 How. (U. S.) R. 510.

So the same Court held, in *Moore v. The People of Illinois*, 14 How. (U. S.) R. 13, that a state may pass a law prohibiting her citizens from harboring fugitive slaves, as matter of state policy, and punish criminally the violation of the statute, notwithstanding the party would also be punishable under the act of congress.

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So, in this case, a state may pass laws punishing acts of forgery practised in defrauding her own citizens by means of any forged instrument, as this state has done, and may punish the violator of the law, although he may be again prosecuted by the general government for violating her laws by the same act which violated the law of the state. In other words, a party in committing a wrongful act, may, by one act, violate the laws of two governments, and render himself amenable to both.

In regard to legislation upon the subject of fugitive slaves, it was thought the case of *Prigg v. Pennsylvania*, 16 Peters 539, had decided the right to be exclusively in congress; hence the decision in *Donnell v. The State*, 3 Ind. R. 480, and *Degant v. Michael*, 2 *id.* 396. The case of *Moore v. The People of Illinois*, *supra*, holds differently, and under it we make this decision, which overrules *Donnell v. The State* and *Degant v. Michael*, *supra*.

On these questions we have only to follow the decisions of the Supreme Court of the *United States*.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

L. Wallace and *W. F. Lane*, for the state.

H. S. Lane, *S. C. Willson*, *R. C. Gregory* and *R. Jones*, for the appellee.

ENGLISH, Administrator, v. THE BOARD OF TRUSTEES OF
THE INDIANA ASBURY UNIVERSITY.

The secretary of a private corporation drew a draft upon the treasurer for the payment of a certain sum for work done by the drawee; but the draft did not specify when it should be payable.

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Held, that it could not draw interest till there was a demand on the treasurer and a refusal of payment.

Held, also, that the circumstance that the drawee had been told by a person connected with the corporation, but not with the treasury department, that there were no funds on hand, did not dispense with the necessity of such demand.

APPEAL from the *Marion* Circuit Court.

Tuesday,
June 12.

PERKINS, J.—Action on an instrument of writing as follows:

“No. 360. \$269 20. *Indiana Asbury University*, secretary's office, *Greencastle, Indiana*, April 25, 1840. The treasurer of *Indiana Asbury University* will pay to *Tisdale Hicks* the sum of two hundred and sixty-nine dollars and twenty cents, for carpenter work. By order of the superintendent. *Thomas Robinson*, secretary *I. A. U.*”

The suit is by *English*, administrator of *Hicks*, who has deceased.

Judgment in the Circuit Court for the plaintiff for the amount of the order, with interest added from the 1st of *September*, 1852, to the date of the judgment.

The plaintiff below thinks he was entitled to interest from the date of the order, and appeals to this Court to obtain it.

It is doubtful, we will remark, whether his complaint was sufficient to entitle him to any judgment; see *Spangler v. McDaniel*, 3 Ind. R. 275; but as no question has been made upon it, we shall make none.

On receiving this order, it was the duty of *Hicks* to present it to the treasurer of the university for acceptance or payment in a reasonable time. *The Wardens and Vestrymen of St. James Church v. Moore et al.*, 1 Ind. R. 289.

It was not presented to that officer till *September*, 1852; and, for this reason, interest was not allowed below.

The excuse for failing to present is, that the holder, *Hicks*, was told by another person connected with the university, but not with the treasury department, that there were no funds on hand. This is no excuse. Had the demand been made, the proper officer might have provided the funds. Till a demand and refusal of payment,

we think the order would not necessarily draw interest. *Chitty*, in his work on Bills, says, "the drawer or indorser of a bill, or indorser of a note, is only liable to pay interest from the time he receives notice of the dishonor." "If, at the time the bill fall due, there be no person legally authorized to receive it, as if the holder be dead intestate, and administration be not taken out, even the acceptor shall be charged with interest only from the time the administrator demands payment of the principal." *Chitty on Bills*, 665. "When interest is made payable by the bill, &c., itself, there is no doubt of its being recoverable as a debt. In other cases it is recovered only as damages for breach of contract; and in such other cases the jury are not bound to give it. If they should be of opinion that the delay of payment has been occasioned by the default of the holder, they may refuse, but otherwise they are bound to find a verdict for interest." *Id.* 663.

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Per Curiam.—The judgment is affirmed with costs.

T. C. W. Sale and *I. Brown*, for the appellant.

S. Yandes, for the appellees.

DETRICK v. THE STATE BANK.

It is not incumbent upon a sheriff to levy upon the personal property of the execution-debtor before proceeding to levy upon real estate, if the personal property is so incumbered that it would probably produce nothing upon the execution.

APPEAL from the *Marion* Circuit Court.

Wednesday,
June 13.

Gookins, J.—*Detrick* filed a bill in chancery against the state bank, the object of which was to set aside a levy made by the bank of an execution from the *Marion* Circuit Court, upon a lot owned by the plaintiff, and to enjoin the bank from selling it. A temporary injunction was

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allowed, which, on the final hearing, was dissolved, and the bill was dismissed. *Detrick* prosecutes this appeal.

On the 18th of *October*, 1847, the bank obtained a judgment against *John Cain*, in the *Marion* Circuit Court. On the 24th of *April*, 1849, *Cain*, being the owner of the lot in question, conveyed it to one *Lessman*, and through other conveyances the title was transmitted to *Detrick*. The bank sued out an execution on said judgment, *September* 26, 1851, which was levied on the lot, and it was advertised by the sheriff to be sold on the 29th day of *November*. There was then due on the judgment about 450 dollars. The bill states that *Cain*, at the time, had personal property subject to execution, sufficient to satisfy the debt, and gives a schedule of it. It alleges also that the lot, when purchased from *Cain*, was unimproved; that the consideration paid for it was 134 dollars; that lasting and valuable improvements have been made upon it, worth 500 dollars. It prays an injunction to prevent the sale of the lot, and also to prevent the sale of the improvements.

The answer admits the title of *Cain* and the plaintiff's claim to the lot, the judgment, execution and levy; and insists upon the lien of the judgment upon the lot as the property of *Cain*. It states that the sheriff, before levying, demanded property of *Cain*, who refused to turn out any, and declared he had none. It denies that *Cain* had personal property subject to the execution, sufficient to satisfy it. It admits that he had such property, but alleges that it was mortgaged to *W. H. Talbott* to its full value, who was entitled to the possession of it. The situation and value of this personal property form the principal subject of inquiry.

It appears from the evidence, that at the time of the issuing of the execution, *Cain* was the keeper of a hotel in *Indianapolis*, called the "*Capital House*," which had formerly been kept by *Cain* and *Talbott*, as partners, holding the property under a lease from *J. P. Drake*. Their partnership was dissolved on the 13th of *February*, 1851, when *Talbott* sold his interest in the lease and furniture to *Cain*, *Drake* accepting *Cain* as his tenant, and releasing *Talbott*

from the covenants in the lease. *Cain*, at the same time, executed a mortgage to *Talbott* upon the furniture in the "*Capital House*," to secure the payment of the following notes: One for 800 dollars, due one year after date; one for 700 dollars, due two years after date; one for 600 dollars, due three years after date; and one for 141 dollars and 93 cents, due three months after date; and also to indemnify *Talbott* against the debts of the partnership, which were to be paid by *Cain*.

Talbott testifies that the property mentioned in the mortgage was worth 4,000 dollars; that the amount secured by the mortgage was about 3,300 or 3,400 dollars, exclusive of the rent of the house; that *Cain* failed to pay the partnership debts, and he was called upon by most of the creditors for payment; and that he was sued upon one of them, after *October 2*, 1851, and some were not paid before *January* or *February*, 1852, but *Cain* ultimately paid them all; that on the 1st of *November*, 1851, the rent due on the hotel was about 800 dollars; that the note of 141 dollars and 93 cents, was paid in boarding himself and his family, and persons in his employ, from *May* to *November*, 1851. He stated that if the property had been seized on execution, he would probably have replevied it, and that when seized by *Drake* by virtue of a distress for the rent of the "*Capital House*," he did replevy it, but that an arrangement was made between himself and *Drake* for their joint benefit; and it appeared that the property was formally advertised and sold about the first of *January*, 1852, and was bought by *Drake* for 2,300 dollars, but that an arrangement had been previously made to sell it to *D. D. Sloan*, who was to succeed *Cain* in the hotel, for 4,500 dollars, and the sale to *Drake* was merely to clear the title.

After the filing of the bill and answer, the plaintiff, by a separate amendment, stated that on the 25th of *December*, 1851, he furnished the defendant with a list of the property in *Cain's* possession, including the lease of the house, and requested the defendant to levy upon it, or to permit the plaintiff to have it done at his own risk and

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expense, which was refused. The furnishing of the list, and the offer to have the execution levied at the plaintiff's risk and expense, were proved. It was also proved that the *Marion* Circuit Court was in session from *December* 8, 1851, to *February* 9, 1852, the object of which was to show that the levy might have been set aside by a motion in that Court.

By the 383d section R. S. 1843, p. 744, the interest of the mortgagor in mortgaged personal property is made subject to execution; and the purchaser succeeds to the rights of the mortgagor in respect to possession and redemption, which leads us to inquire whether *Cais* had an interest in this property that would have been available, had it been taken in execution.

Talbott estimates its value at 4,000 dollars. He proves also that it was sold at private sale to *Sloan*, who was to take the "*Capital House*," for 4,500 dollars. It is possible, though highly improbable, that the property, if taken and sold upon execution, all liens upon it having been waived, would have produced that sum. It was sold to *Sloan* in a body, for the use of the hotel, at the instance of *Drake* and *Talbott*, who, by the sale, discharged it of all liens. Had it been seized and sold on execution, it would have been sold subject to the lien of *Talbott's* mortgage. The purchasers would not have obtained possession of the property, because there was a condition in the mortgage, that if at any time *Talbott* should think it important for his security to sell the property, he might take the same into his possession, and proceed to sell it to satisfy the debts and liabilities, whether due or not, which it can not be doubted would have been enforced, had there been an attempt to sell it on execution. Had the property been brought to sale, under these circumstances, we can not think it would have produced the sum of 4,000 dollars.

The liens upon the property are stated by *Talbott* to have amounted to 3,300 or 3,400 dollars, the medium of which is 3,350 dollars, of which none had been paid, so far as the evidence shows, except the note of 141 dollars and 93 cents, due to *Talbott* when the bill was filed. The ap-

pellant assumes that the partnership debts of *Cain* and *Talbott* had been paid, when the execution issued. *Talbott's* is the only testimony on the subject, and it does not sustain that assumption. He states that some of those debts were not paid before *January* or *February*, 1852, but does not fix the date of the payment of any of them.

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There was, then, after deducting the small note, 3,200 dollars, besides the rent of the house, for which the property was held at the time of the levy, and *Talbott* testifies that there were 800 dollars of rent in arrear on the 1st of *November*, 1851. The appellant insists that only one year's rent was held by the landlord's lien, which he estimates at 630 dollars. The statute provides that when property is seized by execution, on which any landlord has a lien for rent, the officer shall pay him from the proceeds of the sale the amount so due, not exceeding one year's rent. R. S. 1843, p. 829, sec. 214. It is true that is the extent of the claim which *Drake* could have enforced; but it was covered by *Talbott's* mortgage. It was a partnership debt, and *Talbott* was not released from the covenants of the lease until the 15th of *February*. The whole amount of 800 dollars must, therefore, be considered an incumbrance, and the amount must be set down at 4,000 dollars.

Elliott, a witness for the defendant, testified that he considered the lease of the "*Capital House*" worth 700 dollars above the rent, and says he would have given that amount for it. *Talbott* testified that he thought it worth nothing. *Elliott* was a hotel keeper, and *Talbott* had been one under this lease. He had, at least, equal opportunities of knowing its value, and we can not say that there is any preponderance of evidence as to this item in favor of the appellant. The statement of what one would or would not give for property, although it doubtless influences his opinion in regard to its value, furnishes a very uncertain criterion, and is not strictly admissible as a rule of evidence. Every one's private circumstances and wants influence him in respect to what he might be induced to give or withhold for certain property. Mr. *Elliott*, with a view to keeping a hotel, might have been willing to give 700

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dollars for this lease, but nobody knew that, until his deposition was taken, long afterwards, so far as appears. No weight can, therefore, be given to that circumstance. Considering the situation of this property, even had it been sold on execution, we do not think *Cain* is shown to have had an interest in it that would have been of any value. But there is no probability that it would have been sold, had it been seized. The claims of *Talbott* and *Drake* upon it would, without doubt, have been interposed to prevent a sale, had it been levied upon. Nor is it shown that the plaintiff has lost anything by the refusal of the bank to give him the control of the execution. It is therefore unnecessary to consider, whether he was bound to tender an indemnity before he could claim the control of process which would certainly have involved the party in litigation. Such is the usual course.

The question discussed by the parties is, whether the bank should not have been enjoined from selling the improvements upon the lot. That question does not arise in this record. The levy sought to be enjoined was upon the lot. These improvements were made by the grantees of *Cain*, with constructive notice, at least, of the lien of the judgment, and if they remain there until the lot is sold, it will be a question between *Detrick* and the purchaser, as to their respective rights, which we will not anticipate.

Per Curiam.—The decree is affirmed with costs.

J. L. Ketcham, for the appellant.

O. H. Smith and *S. Yandes*, for the appellee.

Under the act of 1853 "to regulate the retailing of spirituous liquors, and for the suppression of the evils arising therefrom," it was not necessary that a house or place wherein spirituous liquors were sold or bartered, &c., without license, in a less quantity than a gallon, &c., should be kept in a disorderly manner, in order to make it a nuisance.

Information, under said act, alleging that the defendant, on, &c., at, &c., not being licensed to vend spirituous liquors by retail, did keep, &c., a certain house, wherein spirituous liquors were sold, &c., in less quantities, &c., in a disorderly manner, constituting a public nuisance, &c. The affidavit did not allege that the house was kept in a disorderly manner. *Held*, on motion to quash, that the variance was immaterial.

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The 15th section of said act does not *limit* the provisions of the act, in regard to nuisances, to licensed houses, but *extends* them to such houses.

An information, under the R. S. 1852, for maintaining a nuisance, need not describe the precise locality of the nuisance.

Section 9 of the act for the punishment of misdemeanors, (2 R. S. 1852, p. 429,) allows the Court to order the removal of a nuisance or not, at its discretion; and, in case of such order, which must always be based upon the testimony given at the trial, the Court is competent to make the direction for its removal specific enough to guide the officer in the discharge of his duty.

A motion in arrest of judgment will not lie for the improper admission or exclusion of evidence nor for the improper giving or refusal of instructions.

APPEAL from the *Decatur* Court of Common Pleas.

Wednesday,
June 13.

GOOKINS, J.—This was a prosecution under the 17th section of the act of 1853, (p. 89,) on the subject of vending spirituous liquors. The defendant moved to quash the information. The motion was overruled, which is assigned for error.

The information states that the defendant, on, &c., at, &c., not being licensed to vend spirituous liquors by retail, did keep and maintain a certain house wherein spirituous liquors were sold on said day, in less quantities than one gallon, (not for medical purposes, &c.,) in a disorderly manner, constituting a public nuisance, &c.

An objection taken to the information is that it does not follow the affidavit. The only difference between the affidavit and the information is, that the former does not charge that the house was kept in a disorderly manner. That charge was unnecessary, and the affidavit and information would have been good without it. By the 17th section, all houses and places wherein spirituous liquors are sold or bartered, directly or indirectly, *without license*, in a less quantity than one gallon, are declared to be common and public nuisances. It is not necessary that they should be kept in a disorderly manner to make them such.

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Another position assumed is, that no offence is charged, because the 15th section of the act limits its provisions, in regard to nuisances, to licensed houses. That section is as follows: "The provisions of this act in regard to disorderly houses, and their punishment as nuisances, and penalties against the keepers thereof, shall apply to persons to whom licenses to retail spirituous liquors shall have been legally granted, during the term for which they shall have been granted." The appellant supposes that this section limits the provisions of the act, in regard to nuisances, to licensed houses. We do not think it *limits*, but that it *extends* them to licensed houses. The 9th section declares that *all* places wherein spirituous liquors are retailed, if kept in a disorderly manner, shall be deemed common nuisances. The 17th section, as we have seen, declares them nuisances, without regard to the manner in which they are conducted, if unlicensed. There is a difference in the penalty in the two cases. If kept in a disorderly manner, the lowest fine is 25 dollars; if not, the fine may be as low as 10 dollars.

A further objection taken to the information is, that it does not point out the particular locality of the house in which the liquors were sold. This objection is founded on the 9th section of the act for the punishment of misdemeanors, (2 R. S. 1852, p. 429,) providing that on conviction of nuisance, the Court *may* order the nuisance to be removed. That is not a necessary part of the judgment. The Court may order its removal or not, at its discretion; and in case of such order, which must always be based upon the testimony given at the trial, the Court is competent to make the direction for its removal sufficiently specific to guide the officer in the discharge of his duty. A description of the precise locality is no necessary part of the information.

The motion to quash the information was correctly overruled.

Upon the plea of not guilty there was a verdict for the state, upon which the defendant moved in arrest of judgment, assigning as reasons therefor the improper admis-

sion and exclusion of evidence, and the improper giving and refusal of instructions. The motion was overruled, upon which the defendant tendered a bill of exceptions setting out the evidence and instructions. The reasons assigned would have been proper on a motion for a new trial, but they have nothing to do with a motion in arrest of judgment.

May Term,
1855.

WELLS
v.
WELLS.

Per Curiam.—The judgment is affirmed with costs.

J. Gavin and *J. R. Coverdill*, for the appellant.

M. J. Williams, for the state.

WELLS v. WELLS.

A minor attains to twenty-one years of age on the day preceding the twenty-first anniversary of his birth.

A decree against an infant, without notice and without evidence, is erroneous.

ERROR to the *Marion* Circuit Court.

Wednesday,
June 13.

STUART, J.—*Wells*, the father, filed his bill in chancery against *Wells*, the son, an infant, in *September*, 1834, alleging that he had purchased, with his own money, certain lands in *Marion* county, in the name of his son, and praying that the title thus nominally placed in the infant son might be vested in him. Decree accordingly.

Counsel seem to be mistaken in asserting that the bill was filed and the decree rendered the same day. The bill was filed *September 23*, 1834, and on that day a guardian *ad litem* was appointed. The answer of *Calvin Fletcher*, guardian *ad litem*, was filed *October 2*, 1834, and the decree then passed.

It no where appears that there was any process, or any evidence. These are the errors assigned. They are clearly sufficient to reverse the case; *Crain v. Parker*, 1 Ind. R. 374; provided *Wells*, the son, has shown himself to be in a position to avail himself of them.

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v.
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We attach no importance to the admissions improvidently made for him by his guardian *ad litem*. But there are other considerations affecting his right to bring error upon which we were not at first so clear. The bill alleges that the land was entered in *January*, 1832; that the son, *E. R. Wells*, was at the time of filing the bill "only six years old." If from this statement we fix his birth-day at *September 23*, 1828, he was of age *September 22*, 1849. That was the date of the removal of the disability. From that date he had five years to bring error. The transcript was filed, and errors assigned in this Court, *November 12*, 1853. So that he is entitled to his writ of error, however reluctant Courts may justly be to open adjudications of such long standing.

But as the decree was rendered without notice to the infant, and without evidence, it must be reversed.

We intimate no opinion as what will be the effect, if any, of the reversal on subsequently acquired titles.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

D. McDonald, W. A. McKenzie and W. Henderson, for the plaintiff.

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196	367
196	506
6	448
135	942

FORELANDER v. HICKS, Administrator.

If at a sale of land upon execution, the execution-plaintiff, by fraudulently representing that he is buying for the purpose of allowing the defendant to redeem, prevents competition, and purchases the land at a price greatly below its value, the defendant may have the sale set aside.

Where there are judgments of different dates against a debtor, in favor of the same creditor, he has a right to apply any voluntary payment to whichever judgment he chooses.

Where evidence was necessary to authorize a judgment of the Circuit Court, it will be presumed, in the absence of a bill of exceptions disclosing the contrary, that the Court proceeded upon proper evidence.

ERROR to the *Johnson* Circuit Court.

STUART, J.—This is a petition, seemingly in the nature of a proceeding in chancery, to set aside a sheriff's sale. Decree according to the prayer of the petition.

The proceeding was had in 1852, while the old practice was still in force. What would have been its fate on demurrer, or on motion in arrest of judgment, is not now a question. These tests of its sufficiency were not applied. Though the language of the petition, "your orator," &c., indicates in the mind of the pleader a bill in chancery, it may perhaps be better designated as a proceeding by notice and motion.

It appears that *Forelander* recovered against *Harrington* three judgments at law, of the following dates and amounts, viz., *September* 6, 1849, for 309 dollars; *March* 7, 1850, for 202 dollars; *March* 6, 1851, for 52 dollars; in all, 563 dollars. On these judgments it is alleged the defendant had paid at different times 450 dollars. These payments, it is said, *Harrington*, at, &c., elected to apply thus: 1. To the judgment of *March* 7, 1850; 2. To the judgment of *March* 6, 1851; leaving a surplus of between 175 and 200 dollars, to be applied on the first judgment of *September* 6, 1849.

It further appears that *Forelander* issued executions on all the judgments, and on the judgment of *March* 6, 1851, execution was issued *February* 20, 1852, by virtue of which the sheriff sold the land, the sale of which this motion seeks to set aside.

The petition sets up that *Harrington* had no notice of any such executions till after the sale; that *Forelander* attended, and prevented bidding, representing that he was buying in the property for the purpose of letting *Harrington* redeem, and under this pretext, which he afterwards refused to comply with, he purchased property worth 1,500 dollars for 192 dollars.

Forelander appeared by counsel, and, it would appear from the record, there was a hearing; upon which it was ordered that the sale be set aside. The Court find the

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amount paid to be 464 dollars, and the payments are applied to the judgments, in accordance with the election of *Harrington*, as alleged in the petition.

The acts of *Forelander*, in preventing competition at the sheriff's sale, were a fraud on *Harrington* and sufficient to set aside the sale. *Vantrees v. Hyatt*, 5 Ind. R. 48.

Harrington had a right to elect to apply any voluntary payment he made on the judgments to whichever of the three he pleased. *The Mayor, &c. v. Patton*, 4 Cranch 317. Perhaps it would be otherwise as to any involuntary payment; for then it would be the duty of the sheriff, notwithstanding the election of the execution-defendant, to apply the money to the execution on the oldest judgment.

Several errors in the proceedings, not apparent on the face of the record, are urged in argument; for instance, that the Court acted without evidence. That fact not appearing in the record, should have been disclosed by bill of exceptions. In the absence of a motion for a new trial and a bill of exceptions setting out the evidence, or showing the fact that there was none, we can not judicially know upon what the Court acted.

We must therefore presume in favor of the action of the Court.

There may perhaps be some informality of a sufficiently grave character to have been reached by motion in arrest of judgment; but that motion was not made. These omissions are the less to be regretted, as it would appear that the substantial justice of the case had been reached.

Per Curiam.—The judgment is affirmed with costs.

F. M. Finch, for the appellant.

D. Hicks, L. Barbour and A. G. Porter, for the appellee.

SEGUR v. THE STATE.

May Term,
1855.

An indictment for selling spirituous liquor by retail did not allege a price for which the liquor was sold. *Held*, that the indictment was bad on motion to quash.

SEGUR
v.
THE STATE.

APPEAL from the *Bartholomew* Circuit Court.

Wednesday,
June 13.

DAVISON, J.—Indictment. The charge is that *Segur*, on, &c., at, &c., not being licensed, &c., did then and there sell spirituous liquors, by a less quantity than a quart at a time, to one *John McKinney*, contrary, &c. Motion to quash the indictment overruled. The defendant then pleaded not guilty. There was a trial by the Court and a finding for the state. The defendant thereupon moved for a new trial and in arrest of judgment; which motions were denied, and judgment given against him, &c.

John McKinney, a witness for the prosecution, testified upon the trial, that on the 9th of *August*, 1851, within *Bartholomew* county in said state, he purchased whiskey by a less quantity than a quart at a time from the defendant, and paid him therefor 5 cents.

The indictment is said to be defective, because it does not allege the price for which the liquor was sold. This Court so held in *Divine v. The State*, 4 Ind. 240, and we are inclined to adhere to that decision. If the defendant, without moving to quash, had proceeded to trial, he could not, under the evidence in this cause, have availed himself of the defect in the indictment on motion for a new trial. *Hare v. The State*, *id.* 241. But here the objection was raised at the earliest stage of the case, and should have been sustained.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. W. Chapman and *J. B. Merriwether*, for the appellant.
R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

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1855.

BRINGHURST v. POLLARD and Another.

BRINGHURST
v.
POLLARD.

In an affidavit for a writ of replevin, before a justice of the peace, under the R. S. 1843, it was not necessary to allege that the property sought to be replevied had not been taken for any tax or assessment against the plaintiff, nor seized under any execution or attachment against his goods.

Wednesday,
June 13.

APPEAL from the *Cass* Circuit Court.

DAVISON, J.—*Pollard* and *Wilson* sued *Bringhurst* in replevin, before a justice of the peace. The affidavit which preceded the commencement of the suit, states that *Bringhurst* wrongfully took and unlawfully detained from the plaintiffs, in the county of *Cass*, one sack of *Rio* coffee, being their personal goods, &c.

Before the justice there was a motion to dismiss the suit, for want of a sufficient affidavit. This motion was denied, and judgment given for the plaintiffs. The defendant appealed, and in the Circuit Court renewed the motion to dismiss, which was overruled, and a similar judgment rendered.

The objection to the affidavit raises the only question in the case. The appellant says that it is defective, there being no averment that the property sought to be replevied had not been taken from the plaintiffs for any tax or assessment, nor seized under any execution or attachment against their goods. Without such averment in the affidavit, it is very clear that no writ of replevin could, in a case like this, have properly issued from the Circuit Court. R. S. 1843, c. 40, s. 165. And if this section was the only provision on the subject, it would be difficult to sustain the ruling of the Court. But the same revision contains an article which relates exclusively to proceedings before justices in actions of replevin. *Id.*, art. 11, c. 47. The affidavit before us is strictly within the requirements of the latter enactment, and must therefore be deemed sufficient.

STUART, J., having been concerned as counsel, was absent.

Per Curiam.—The judgment is affirmed with costs.

W. Z. Stuart, for the appellant.

D. D. Pratt, for the appellees.

McKINNEY v. SPRINGER.

May Term,
1855.McKINNEY
v.
SPRINGER.

A party waives his objections to instructions by not excepting to them.

By omitting to except to the refusal of instructions, a party will be treated as having acquiesced in the refusal.

To make a ruling of the Circuit Court the subject of review in the Supreme Court, it must have been excepted to when it was made.

A motion in arrest of judgment is an affirmance of the verdict, and a motion for a new trial can not afterwards be entertained, unless the cause upon which it is founded was discovered after the motion in arrest was made.

Where no exception has been taken to the admission of evidence in the Court below, its admissibility will not be examined in the Supreme Court.

APPEAL from the *Decatur* Circuit Court.

Wednesday,
June 13.

Per Curiam.—Assumpsit by *Springer* against *McKinney* for work and labor done and materials furnished, in and about the building of a house. The defence involved questions upon the statute of limitations, the breach of a special contract, and the amount recoverable on the common counts. The suit was commenced in 1844, and resulted, on the first trial, in a judgment for the plaintiff for 1,141 dollars and 65 cents.

That judgment was reversed in this Court in 1847, and the cause remanded for another trial. *McKinney v. Springer*, 8 Blackf. 506.

That trial resulted in a judgment for the plaintiff for 2,200 dollars, which judgment was subsequently reversed, on appeal, in this Court, the cause being again remanded for a further trial. This was in 1851. *McKinney v. Springer*, 3 Ind. R. 59.

The third trial occurred in 1853, and was less fortunate than the preceding for the plaintiff. His recovery amounted to but 1,246 dollars, of which, on the suggestion of the Court, he remitted 178 dollars, leaving his final judgment to be rendered but for 1,068 dollars.

Tempted by his previous good fortune here, the defendant has again appealed to this Court; and he assigns three errors: 1. The Court erred in the instructions given to the jury. 2. The Court erred in refusing to give instructions asked. 3. The Court erred in refusing to grant the motion for a new trial.

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1855.

McKINNEY
v.
SPRINGER.

We can not examine into the first assignment. Instructions were given, and made a part of the record, but they were not excepted to, and, hence, objection to them must be considered as having been waived. It was so ruled in *Comparet v. Hedges*, 6 Blackf. 416. The Court there say that the instruction given was clearly wrong, "but as no objection was made to the charge when given," it was then too late, &c. In *Jones v. Van Patten*, 3 Ind. R. 107, it is held that instructions must be excepted to before the jury deliver their verdict. See, also, *Heaston v. Colgrove*, *id.* 265.

Nor can we look into the second assignment. Some instructions were asked and not given, but no exception was taken. The right to insist upon them was, consequently, waived. Every ruling of the Court, which the party claims to have reviewed here, must be excepted to when the ruling is made. 2 R. S. 112, sec. 325.—4 Chitt. Gen. Pr. 10.—2 Swan's Pr. 904.—*Phelps v. Mayer*, 15 How. (U. S.) R. 160.—*Turner v. Yates*, 16 *id.* 14.

The motion for a new trial was made too late. It was subsequent to a motion in arrest of judgment, which motion was an affirmance of the verdict by the party who made the motion. *Chitty*, in his General Practice, vol. 4, p. 77, says: "After an unsuccessful motion in arrest of judgment, a party is not at liberty to move for a new trial, even within the first four days of the term, for by moving to arrest the judgment he affirms the verdict." See, also, 2 Swan's Pr., 921.

This rule is qualified in *Mason v. Palmerton*, 2 Ind. R. 117, so far as to permit the motion for a new trial after that in arrest, where the cause for moving for a new trial was discovered after the motion in arrest had been made.

Thus far upon the ground that the motion was too late. But had it been made in time, the new trial could not have been granted. No exception is taken to the evidence, in the brief of counsel, nor in the assignment of errors, and none, as we have seen, can be heard as to the instructions. The case stands, then, before us upon the weight of evidence, (supposing the motion for a new trial properly

made,) and upon the evidence we could not disturb the verdict of the jury, for it surely tends to sustain that verdict.

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v.
Cohen.

Counsel for the defendant in this Court further contend that the motion for a new trial can not be noticed, because not made upon a written statement of causes filed at the time of making it, as required by section 355, 2 R. S., p. 119.

The counsel would be correct in their position, but for the fact that the statute cited did not take effect till six days after the motion was made.

The judgment is affirmed, with 2 per cent. damages and costs.

DAVISON, J., having been concerned as counsel, on the first trial of this cause in the Circuit Court, was absent.

J. Ryman, for the appellant.

L. Barbour and *A. G. Porter*, for the appellee.

WOOD *v.* COHEN and Another.

The owner of a chattel can not maintain an action to recover the possession against one who has purchased it *bona fide* from a wrongful taker, until he has made a demand for its return.

Action by *A.* against *B.* and *C.* to recover possession of a horse. The complaint alleged that the horse was wrongfully taken by *B.*, and wrongfully detained by *B.* and *C.* *B.* answered, denying the wrongful taking and detention, and averring that he sold the property in good faith to *C.*, and that it was *C.*'s property. *C.* answered, denying the wrongful detention, and alleging the horse to be his property, &c. Held, that *B.* was a competent witness for *C.* on the trial; but to what extent he might be allowed to testify was not decided.

APPEAL from the *Wayne* Court of Common Pleas.

Wednesday,
June 13.

PERKINS, J.—Action to recover the possession of a horse. The complaint alleges that the horse was tortiously taken by one of the defendants, and is wrongfully detained by

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both. The defendants severally answered, *Wood* denying his wrongful taking and detention, and *Cohen* his wrongful detention, of the horse, and both asserting it to be the property of *Cohen*; defendant *Wood* stating that he sold the horse in good faith to *Cohen*. The plaintiff replied, denying the truth of the answers.

On the trial, *Cohen* offered his co-defendant, *Wood*, as a witness in his behalf. The plaintiff objected to the competency of *Wood* as a witness, on the ground of his joint interest with *Cohen* in the suit, *Wood* admitting that he had sold the horse to *Cohen*, and would be liable over to him if the plaintiff succeeded; but the Court permitted the witness to be sworn (1).

The judgment in this case, had it been in favor of the plaintiff, for the recovery of the horse, would not necessarily have been joint against the defendants.

If *Wood* wrongfully took the horse from the plaintiff, he would have been liable without a demand for its return having been made; whereas, if his co-defendant, *Cohen*, was a *bona fide* purchaser of the horse, even from the wrongful taker, he would not have been liable in the absence of such a demand. *Barrett v. Warren*, 3 Hill (N. Y.) R. 348.—*Pringle v. Philips*, 5 Sandf. (N. Y.) R. 157. And, according to the late *English* authorities, he would not, under such circumstances, have been liable at all. See the cases cited and commented upon in *Pringle v. Philips*, *supra*. But we do not mean to intimate a sanction of this doctrine. It might have been important, therefore, for *Cohen* to show that though *Wood* wrongfully took the horse and was liable in the suit, yet that he was a *bona fide* purchaser from him, and, hence, not liable, at all events, in the absence of a demand; and, so far, his interest and that of his co-defendant would have been antagonistic, and not joint in the statutory sense of the word. We think *Wood* was rightly admitted as a witness. *The City of New-York v. Price*, 4 Sandf. (N. Y.) R. 616.—*Beal v. Finch et al.*, 1 Kernan's (N. Y.) R. 128, a case in which the whole subject under the *New-York* code is discussed (2).

To what extent a co-defendant, when made a witness, as in this case, is to be permitted to testify, is another question, and one not now raised.

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1855.

WOOD
v.
COHEN.

The judgment below was for the defendants, and it is contended that it should have been for the plaintiff. It is insisted that the evidence showed that a fraudulent sale of the horse had been made by the defendant *Wood* to the plaintiff, and that such sale deprived him of title, and the right to repossess himself of the article sold. The assumption of law is correct; *Mandlove v. Burton*, 1 Ind. R. 39; but it is not clear that any sale was made, and the question was for the jury upon the evidence.

Per Curiam.—The judgment is affirmed with costs.

C. H. Test and *J. M. Wilson*, for the appellant.

O. P. Morton and *M. Wilson*, for the appellees.

(1) The question in relation to the admissibility of the witness arose upon the following statute:

"A party may be examined on behalf of his co-plaintiff or co-defendant, as to any matter in which he is not jointly interested, or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint judgment shall be rendered," &c. 2 R. S. 1852, p. 97.

(2) In the case cited in the text, which was upon the construction of a statutory provision similar to our own, cited in note 1, the Court held that the word *shall*, in the clause "and as to which a separate and not joint judgment shall be rendered," was to be construed as synonymous with *can*.

The action was for an assault and battery, in which one of the defendants had been offered as a witness for his co-defendants.

Parker, J., in his opinion, says, "Though this section is not expressed in very clear terms, it seems to me there can be no doubt as to its meaning. Of course it can be applicable only when defendants are sued jointly. There can be co-defendants in no other case; and it declares as to what matters a defendant, thus jointly sued with others, may be a witness for his co-defendant. It is as to a matter in which he is not jointly interested, and as to which a separate judgment may be rendered. He is a competent witness in all cases where sued jointly, but only as to certain matters. He may prove that his co-defendant was not present, or, if present, that he took no part in the assault and battery, or any other separate defence of his co-defendant; and, as to such matter, a verdict or judgment which is separate and not joint can be rendered. * * * It is very plain that this section applies to every case of a joint and several contract, and to every tort, which is always joint and several, and extends even further, viz., to contracts joint and not several, where one of the defendants has a separate legal defence, as may sometimes happen. Such separate defence must, of course, be some matter in which the defendant testifying is not jointly interested, and as to which a separate judgment may be rendered, such as infancy, forgery of the signature of the co-defendant, &c.

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"To say that this section applies only to an action in which a joint judgment can not be rendered, would confine it to a case where there is only one defendant, for where there are two defendants there may be a joint judgment; and it can not mean an action where there is but one defendant, for in such case there can be no co-defendant, and the section would be inapplicable.

"In all actions a defendant is a competent witness for his co-defendant. His admissibility as a witness can not be questioned, but he is restricted as to the subject-matter of his examination. If any question be asked tending to establish a defence of which the co-defendant can not separately avail himself, the plaintiff is at liberty to object, and the Court must exclude it. Where a witness is called to the stand who is competent to be sworn and to testify to some matters, but who may not speak of other matters, it is not proper to object to his competency generally and exclude him. It will not be presumed that an improper question will be asked him. It is only by objecting to improper questions when asked, that a party can exclude improper evidence. A party having a witness on the stand, may be called upon by his adversary to state what he proposes to prove, and in that case he must state it. But he need make no such statement unless called upon to do so. It is enough for him to proceed and put his questions to the witness, unless desired to state what he expects to prove."

Two of the eight judges composing the Court dissented.

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MILES v. WINGATE and Another.

When an action has been brought for the disturbance of a certain right, and a verdict obtained for the plaintiff under the general issue, and another action for the disturbance of the same right is commenced between the same parties, the general issue being pleaded, the verdict in the former action is admissible in the second action, as strong, though not conclusive evidence to sustain the plaintiff's right; and it is also admissible to enhance the damages.

A record is an entire thing, and if admissible in evidence for any purpose, all its parts are to be received.

Case for a nuisance occasioned by the defendant's so constructing and maintaining a roof as to cause the water to flow from it against the plaintiffs' house. Plea, not guilty. The plaintiffs were allowed to give in evidence, notwithstanding the defendant's objection, the record of a former recovery in their favor against the defendant, for the same nuisance for the continuance of which the present action was brought. *Held*, that a bill of exceptions taken in the former case was properly admitted to show the identity of the subject of this suit with that of the former suit, and, as included therein, the venue; but, *held*, that it was not admissible to show that the evidence was too weak to have supported the action.

ERROR to the *Clay* Circuit Court.May Term,
1855.

GOOKINS, J.—*Wingate* and *Black* brought an action on the case against *Miles* for a nuisance, alleged to have been caused by the defendant so constructing and maintaining a roof as to cause the water to flow from it against the plaintiffs' house. Plea, not guilty. Verdict for the plaintiffs. Motion for a new trial overruled, and judgment. The record contains the evidence.

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v.
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On the trial the plaintiffs were permitted to give in evidence, against the defendant's objection, the record of a previous recovery in their favor against the defendant, for the same nuisance for the continuance of which this action was brought; which ruling is now assigned for error. This record contained a bill of exceptions embodying much testimony of the same character as that which was given on the present trial, and, on the general issue pleaded, the plaintiffs had a verdict and judgment. It was decided by this Court, in the case of *Haller v. Pine*, 8 Blackf. 175, that when an action has been brought for the disturbance of a certain right, and a verdict obtained for the plaintiff under the general issue, and another action for the disturbance of the same right is commenced between the same parties, the general issue being pleaded, the first recovery is strong, though not conclusive evidence for the plaintiff in the second action to sustain his right. The record was therefore properly admitted. It was also admissible to enhance the damages. Every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie; and very exemplary damages will probably be given, if, after one verdict against the defendant he has the hardiness to continue it. 3 Blacks. Comm. 220.—Sedgwick on the Measure of Damages, 144.

It is objected that the bill of exceptions taken on the former trial should not have been admitted. The objection is not well taken. A record is an entire thing, and if admissible for any purpose, all its parts are received. It was proper to show the identity of the subject of this suit with that of the former action. We must presume that

May Term, 1855. the Circuit Court informed the jury for what purposes they might regard it as evidence.

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It is objected that the evidence did not authorize the verdict, and two particulars are pointed out in which it is supposed to have been insufficient. One is, that certain evidence contained in the bill of exceptions, which was embodied in the record of the former recovery, shows that the defendant's house was erected first, and that the plaintiffs' house encroaches nine inches upon the defendant's lot, which subjects it to the injury complained of. Suppose the appellant could make the proposed use of that evidence, we think it does not prove his assumption. A witness testified that he and another had found what they believed to be a stake indicating the corner of the lot, but that he did not know that it was such. The jury on that trial doubtless gave due weight to this evidence, and their verdict was for the plaintiffs. But the bill of exceptions was not admissible for that purpose. We have already shown for what purpose the plaintiffs might use it.

The other point in which the evidence is supposed to be defective, is, that the property was not proved to have been situated in *Clay* county, and that the action being local, the verdict was wrong. Without stopping to inquire whether this action is local or transitory, we think the venue is proved. Mr. *Hanna* testified that the property for the injury to which this action is brought, was the same which was in controversy in the former suit, and the record of that suit showed that it was situated in *Clay* county. We have shown that that record was admissible to prove the identity of the subject-matter in the two cases; hence the venue was proved.

It is further urged that the evidence shows that the injury did not result wholly from the conduct of the defendant, but in part from the carelessness of the plaintiffs. There was evidence tending to prove that state of facts; but it has been weighed by the jury, and there is no such preponderance in favor of the position assumed as will authorize us to disturb the verdict.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs. May Term,
1855.

J. M. Hanna, for the plaintiff.

J. P. Usher, for the defendants.

SHOOK
v.
THE BOARD
OF COMMISSIONERS OF
RIPLEY
COUNTY.

SHOOK v. THE BOARD OF COMMISSIONERS OF RIPLEY
COUNTY.

An agreement of a creditor with the principal debtor to delay the collection of the debt, must be founded on a consideration in order to discharge the sureties.

The language of a bond was as follows: "We or either of us promise to pay the state of *Indiana*, for the use of the surplus revenue fund," &c., "on or before the 23d day of *January*, 1846, 100 dollars, with interest thereon at the rate of 7 per cent. per annum, payable in advance, commencing even date herewith, and do agree that in case of a failure to pay any instalment of interest, the said principal sum shall become due and collectable, together with all arrears of interest; and on failure to pay the principal or interest when due, 5 per cent. damages on the whole sum due shall be collected and costs. In testimony," &c. *Held*, that it plainly appeared that though the bond was to be due one year from date, yet that it was the intention of the parties that further time might be given upon payment of the annual interest.

APPEAL from the *Ripley* Circuit Court.

Thursday,
June 14.

GOOKINS, J.—This was a bill in chancery by *Shook* against the board of commissioners and auditor of *Ripley* county, to enjoin part of a judgment at law. A demurrer to the bill was sustained by the Circuit Court, and the bill dismissed. *Shook* appeals.

The material allegations of the bill are, that on the 23d of *January*, 1845, *David P. Shook*, one *Hezekiah Shook*, and *Peter Shook*, the plaintiff, executed four writings obligatory to the state, amounting in all to 687 dollars and 42 cents, which were taken by the officers having control of the surplus revenue fund of said county, on pretence that said *David P. Shook*, who had been an agent for that

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fund, was a defaulter to that amount; that said *David P. Shook* was principal, and the plaintiff and *Hezekiah Shook* were sureties in said bonds; that three of them were for 100 dollars each, one due one year after date, another two years after date, and the other three years after date. The bonds are particularly described in the bill, and are in the following form :

"We, or either of us, promise to pay the state of *Indiana*, for the use of the surplus revenue fund of the county of *Ripley* and state of *Indiana*, on or before the 23d day of *January*, 1846, one hundred dollars, with interest thereon at the rate of seven per cent. per annum, payable in advance, commencing even date herewith, and do agree that in case of a failure to pay any instalment of interest, the said principal sum shall become due and collectable, together with all arrears of interest; and on failure to pay the principal or interest, when due, five per cent. damages on the whole sum due shall be collected and costs. In testimony whereof we have set our hands and seals, this 23d day of *January*, 1845. *David P. Shook*, [SEAL.] *Peter Shook*, [SEAL.] *H. Shook, sen.*, [SEAL.]"

That *David P. Shook*, at the date of the bonds, paid the interest thereon for one year, at the rate of 7 per cent., in advance; that on the 6th of *September*, 1846, the auditor and treasurer of *Ripley* county agreed with *David P. Shook*, without the knowledge and against the will of his sureties, that if he would pay the interest on said bonds from the 23d day of *January*, 1846, for one year, at 7 per cent., they would give day thereon until the 23d day of *January*, 1847; which sum was paid, and the time given; all which, it is alleged, will appear by reference to the bonds and indorsements, which are copied into the bill. The indorsements are stated to have been made by the officers having control of said fund; and it is alleged that similar arrangements were made for an extension of time from *January*, 1847, to *January*, 1848, and from *January*, 1848, to *January*, 1849, and on the second and third bonds to *January*, 1850. The indorsements on the bonds are in the following form :

"January 23, 1845. Treasurer's receipt filed for 7 dollars, in full on the within note to 23d of January, 1846. James L. Yates, A. R. C." May Term, 1855.

"September 4, 1846. Treasurer's receipt filed for 7 dollars, in full on the note to January 23, 1847. James L. Yates, A. R. C." SHOOK
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"September 6, 1847. Treasurer's receipt filed for 7 dollars, interest in full on the within note to January 23, 1848. J. L. Yates, auditor."

The other indorsements are of like character.

The bill further alleges that the county of Ripley, by her agents, had recovered a judgment at law in the name of the state on said bonds, and another of like character for 387 dollars and 42 cents, which judgment amounted to 856 dollars and 48 cents, and included five per cent. damages on the amount of said bonds; that in said action he could not avail himself of the defence that indulgence had been given to the principal, because the defence was of an equitable nature, and not cognizable at law. He alleges that *David P. Shook* is insolvent, and prays that so much of the judgment as is founded on the said three bonds may be enjoined.

We think this bill can not be sustained. The principal question it presents was considered in the case of *Shook v. The State, ex rel., &c.*, at the present term of this Court, (*ante*, p. 113,) which was the action at law mentioned in the bill. The agreement for delay here set up was pleaded in that action. On demurrer to the plea, our conclusion was, that the payment of 7 per cent. per annum interest in advance was no more than was stipulated for in these contracts, and that therefore no consideration was shown for the promise to delay. See *Reynolds v. Ward*, 5 Wend. 501.—*The Oxford Bank v. Lewis*, 8 Pick. 458.

Although one of the bonds would be due one year after date, its language shows very plainly that it was the intention of the parties that further time might be given upon payment of the annual interest. The stipulations to pay 7 per cent. per annum interest in advance, and that on failure to pay any instalment of interest, the principal should

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become due and collectable, show this intention. They could not have referred to an instalment of interest that was payable at the time of the making of the contract, and they are wholly without meaning unless applied to interest which might be paid in the future, on payment of which a further delay was to be given. The term "payable in advance," of itself showed that one year at least was to be given after such payment. A contract must be so construed as to give effect to all its parts, if it be capable of such a construction. The parties have put this construction upon these contracts, as is shown by the payments of interest indorsed upon them. Nor do those indorsements show, as the bill supposes, any agreement for delay. They show nothing but the payment of interest. The entries are made by the proper officers, in the proper form, and nothing is said about giving time; and, according to the plaintiff's construction of the bonds, an action might have been brought to recover the principal immediately after the payment of the interest. Such, however, was not the intention of the parties, as we have already shown.

Per Curiam.—The decree is affirmed with costs.

E. Dumont, for the appellant.

J. Ryman, for the appellees.

BERTENSHAW v. MOFFITT and Others.

A., in February, 1846, recovered a judgment against *B.*, in the Franklin Circuit Court, for 61 dollars. *B.*, afterwards, in May, 1846, being the owner of two lots in Brookville, mortgaged them to *C.*, to secure the payment of 168 dollars. In August, 1846, *D.* recovered a judgment in said Court against *B.* and others, for 146 dollars. The lots, which were worth from 350 to 400 dollars, were afterwards sold at sheriff's sale, for 11 dollars, to *D.*, on his judgment. Afterwards *D.* purchased *A.*'s judgment, exposed the lots to sale thereon, and himself became the purchaser at the sum of 20 dollars. *Held*, that as to *C.*, neither sale was void for inadequacy of price.

ERROR to the *Franklin* Circuit Court.

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1855.

STUART, J.—Bill in chancery by *Bertenshaw* against *Moffitt* and others. The case discloses the following facts: BERTENSHAW

v.
MOFFITT.

In *February*, 1846, one *Gallion* had recovered a judgment against *William Moffitt*, jr., one of the defendants, in the *Franklin* Circuit Court, for 61 dollars.

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In *May*, 1846, *William Moffitt*, jr., being the owner of lots seven and eight, in the town of *Brookville*, mortgaged them to the complainant *Bertenshaw*, to secure the payment of 168 dollars.

In *August*, 1846, the defendant *Stoops* recovered a judgment in the *Franklin* Circuit Court for 146 dollars against *William Moffitt*, jr., and *John, Elijah* and *Wesley Moffitt*.

The lots in *Brookville*, worth from 350 to 400 dollars, were sold on the *Stoops* judgment for 11 dollars. *Stoops* himself became the purchaser. This purchase was of course subject to the two prior liens, viz., the *Gallion* judgment of 61 dollars and the *Bertenshaw* mortgage of 168 dollars; making the prior liens in all 229 dollars; the liens and the bid together 240 dollars. Thus far there is no difficulty. The price, compared with the value of the property, could not be considered inadequate, particularly in a judicial sale. *Benton v. Shreeve*, 4 Ind. R. 66.

Afterwards *Stoops* purchased the *Gallion* judgment; again exposed the *Brookville* lots (seven and eight) for sale thereon; and became the purchaser at 20 dollars.

Stoops transferred his last bid to *Atwell Johnson*, one of the defendants, who appears to have been fully cognizant of all the facts. *Johnson* paid *Stoops* 305 dollars for the substitution, and the sheriff made the deed to him accordingly as the substituted purchaser.

It further appears that the lots were bid off at the latter sale by the attorney of *Stoops*. *William Moffitt*, jr., seems to have interfered to prevent bidders from competing at the sale. The sheriff's deposition discloses that fact. "When," says the sheriff, "any one bid against *Stoops*' attorney, *William Moffitt*, jr., appeared dissatisfied, and said it was unnecessary to run it up, for the intention was

May Term, 1855. to redeem. But nothing was said about the redemption when the deed was delivered."

DOE
v.
CLARK.

The majority of the Court regard the whole transaction in this light. *Stoops'* first purchase was an effort to protect his own interest to the extent of the judgment he had recovered. That judgment was 146 dollars. His bid on the second sale is to be added, making the entire extent of *Stoops'* interest 166 dollars. Under all the circumstances, the majority of the Court are reluctant to say that the price paid at the sale on the *Gallion* judgment is so grossly inadequate as of itself to import fraud; and that as *Bertenshaw* had constructive notice of the *Gallion* judgment at the time he took his mortgage, he should either have attended the sheriff's sale or taken other proper steps to discharge that judgment, and thus protect his own junior incumbrance. Having failed to remove the prior lien as he might have done, he must abide the consequences of his own neglect. He is not entitled to relief.

Per Curiam.—The decree is affirmed with costs.

J. Ryman, for the plaintiff.

G. Holland, for the defendants.

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170 539

DOE on the demise of BROWN v. CLARK.

Where a party has moved in arrest of judgment, he can not afterwards take the opinion of the Court on the sufficiency of the evidence on a motion for a new trial.

Where the record does not profess to contain all the evidence, it will be presumed that there was sufficient to support the judgment.

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APPEAL from the *Whitley* Circuit Court.

DAVISON, J.—Ejectment for a quarter-section of land in *Whitley* county. Plea, not guilty. The Court tried the cause and found for the defendant. The plaintiff moved in arrest of judgment, and also for a new trial.

The following are the reasons assigned for a new trial: 1. That the finding was contrary to the evidence. 2. That the evidence established the plaintiff's title and not the defendant's.

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v.
PATTY.

These motions were overruled and judgment given for the defendant.

The order in which the motions stand in the record shows that the motion in arrest was first made; and we have decided, that "where a party has moved in arrest, he can not afterwards take the opinion of the Court on the sufficiency of the evidence on motion for a new trial." *Bepley v. The State*, 4 Ind. R. 264.—*Rogers v. Maxwell*, *id.* 243.—2 Ind. R. 117. As no cause in arrest appears to have been alleged, or to exist in the proceedings, both motions were properly overruled.

But there is another ground upon which the ruling of the Court must be sustained. The record does not profess to contain all the evidence given on the trial. We will therefore, in favor of the decision of the Court, presume that there was evidence before it sufficient to sustain the judgment.

Per Curiam.—The judgment is affirmed with costs.

J. L. Worden and *I. Blackford*, for the appellant.

R. Brackenridge, jr., for the appellee.

MEEKER and Another, Administrators, v. PATTY and Others.

In every bill of exceptions purporting to set out the evidence on motion for a new trial overruled, the words "this was all the evidence given in the cause," are, by a rule of the Supreme Court, to be regarded as technical, and indispensable to repel the presumption of other evidence.

APPEAL from the *Wayne* Court of Common Pleas.

Per Curiam.—The appellees sued the administrators of *Reuben Worth*, deceased, to recover a distributive share of

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May Term, 1855. *an estate, alleged to have come into the hands of Worth in his lifetime. The Court tried the cause and found for the plaintiffs. New trial refused, and judgment on the finding.*

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v.
Epperly.

The insufficiency of the evidence to support the judgment, is the only error assigned.

In the record there is a bill of exceptions, which sets out certain evidence, but it contains no sufficient statement that all the evidence given on the trial is embraced in the bill. A rule of this Court, established at the *May* term, 1853, provides, that "in every bill of exceptions purporting to set out the evidence on motion for a new trial overruled, the words 'this was all the evidence given in the cause,' are to be regarded technical, and indispensable to repel the presumption of other evidence." The form of expression required by the above rule, viz., "this was all the evidence given in the cause," has not been followed in the present case. We must therefore presume that the Court below had before it evidence sufficient to sustain the judgment.

The judgment is affirmed, with 2 per cent. damages and costs.

W. A. Bickle, for the appellants.

J. B. Julian, for the appellees.

NOBLE v. EPPERLY.

In a suit, under the R. S. 1852, to recover the possession of personal property, if, under the issues, the defendant, in the event of success at the trial, would be entitled to a return of the property, the jury may find the value of the property, and damages for the detention thereof; and in case they omit to do so, the Court may direct them to supply such omission.

If, in a suit under the R. S. 1852, to recover the possession of personal property, the defendant pleads property in himself, he is entitled, on a verdict in his favor, to a return of the property, and also to damages.

The amount of damages, in such case, depends upon the defendant's interest in the property, whether as bailee, or absolute owner, the time he had been deprived of it, its character, &c.

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1855.

Where, on the trial of a cause, a written agreement between the parties comes up collaterally, merely as evidence, and is sought to be used to the injury of one of the parties, its true character may be shown by parol evidence.

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v.
EPPERLY.

APPEAL from the *Wayne* Circuit Court.

Thursday,
June 14.

PERKINS, J.—Replevin, by *Noble* against *Epperly*, for a quantity of corn, cattle, &c. The suit was commenced and brought to issue before the new code of practice came into force, but tried afterward. Pleas, *non detinet* and property in the defendant. Replication to the second plea, reaffirming the allegation in the declaration of property in the plaintiff, and denying property in the defendant. The issues were submitted for decision to a jury, and a general verdict returned for the defendant. The Court declined to receive the verdict, and remanded the jury to their room to consider further of the value of the property replevied, and of the damages. Subsequently the jury returned a second verdict, finding for the defendant, and that the property in question was of the value of 367 dollars and 50 cents, and the damage for its detention 120 dollars.

The Court denied a new trial.

The first error assigned consists in the Court remanding the jury to consider of the value of the property and the damage for its detention.

Our statute, (2 R. S., p. 122, s. 374,) enacts, in reference to this class of actions, that "where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or its value in case a return can not be had, and damages for the taking and withholding of the property."

This enactment shows that where the issues are such that the defendant, in the event of success at the trial, would be entitled to a return of the property, there the jury may find the value of the property, and damages; and that, failing to do so, it could scarcely be error in the Court to direct them to supply the omission. In the case

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before us, the defendant would, if successful at the trial, be entitled to a return of the property. He pleaded property in himself and not in the plaintiff; and in *Martin v. Ray*, 1 Blackf. 291, the Court say, "when the property can be shown to be out of the plaintiff, it is well settled by authority, that he can not recover in the action of replevin." The plea of property in a stranger, therefore, they say, "goes to the point of the action, and entitles the defendant to a return without avowry, because it shows the property to have been 'illegally taken from' him." *A fortiori*, does a plea of property in the defendant so entitle him; and here the plea was property in the defendant himself. The defendant, then, being entitled to a return of the property, was entitled also to some amount of damages; but how great would depend upon his interest in the property, whether as bailee or absolute owner, the time he had been deprived of it, its character, &c. See *Pierce v. Van Dyke*, 6 Hill (N. Y.) R. 613.

It is objected that the damages awarded were not authorized by the evidence. The articles of property wrongfully taken in replevin were, corn of the value of 37 dollars and 50 cents, five cows and calves, one steer, two heifers, two bulls, and six horses. They were detained about two years and a half from the defendant, who, the jury may have believed, was the absolute owner of them, and who was a farmer keeping and using the articles upon his farm at the time they were taken. Their value has been already stated. We think, upon these facts, the jury might assess the damages, and that the assessment made, considering the character of the property, was low enough.

Objections are made to instructions asked and refused, to instructions given, and to the admission of one item of testimony.

All the evidence not being upon the record, we find it somewhat difficult to appreciate the force of the objections.

We gather from the record that *Epperly* was, at a given date, the undisputed owner of the property in question; that an execution came out against him upon which the property was sold, *Noble* being the purchaser; that at that

time *Noble* and *Epperly* were engaged together upon some terms (but what is a matter of dispute) in pork-packing; that it was upon the strength of the purchase at said execution-sale that this replevin was brought, and that the evidence upon the trial tended to support, 1. The hypothesis that *Noble* purchased the property at sheriff's sale for himself, and with his own funds; 2. The hypothesis that he purchased it with the funds of *Epperly*, and for him, as his agent; and 3. That he purchased it with funds belonging to *Noble* and *Epperly*, as partners in the pork business, without any special agreement as to how the money was to be settled for by *Epperly*.

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Now, after carefully looking over the numerous instructions given, we can not say that they did not fairly put the case to the jury upon the different hypotheses and cover all the ground upon which instructions were required. Indeed, those given are objected to by counsel only in the following words:

"We insist that the following instructions given by the Court, to-wit—[here the numbers of the instructions are set down]—are vague, illegal and improper, and should not have been given."

Now this assertion is very positive and broad, and cost the counsel but little labor to make it; yet it would have been much more satisfactory to the Court, and might have had more influence upon the decision of the cause, had it been followed by an exposition showing wherein the instructions were vague, illegal and improper. Without such exposition the assertion is of little force.

As tending to disprove the truth of the third hypothesis, *Noble* offered in evidence an agreement between himself and *Epperly*, entered into before operations were commenced, stating that they were not partners in the pork business, but that *Noble* was proprietor and *Epperly* agent.

The Court permitted the subscribing witness to testify in regard to the agreement as follows:

"The object of the parties in entering into this article was to prevent *Epperly's* creditors seizing upon the pork when in bulk for his debts, and prevent the parties from

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being able to pay the debts they had incurred in purchasing it. This was *Noble's* reason. He said he would not have anything to do with it unless he was made perfectly safe, as he did not want to involve himself with *Epperly's* debts. The ground-work of the conversation between the parties was, to help or relieve *Epperly*, as *Noble* said."

And touching this point, the Court gave instruction number nine, one of those objected to with most justice, as being "vague, illegal and improper." It reads thus:

"Upon the subject of partnership, the written agreement made between the parties and presented in evidence, can not be, by parol evidence, altered, explained, or varied in the terms thereof from the writing itself. Neither can any parol agreement between the parties before or at the time of the executing of the agreement between the parties, be regarded as varying its terms; and it must be received by the jury as the terms of the partnership. It is, of itself, the depository of all facts it purports to be the depository of; but the jury may regard such independent and collateral facts and circumstances as shall go to show that the instrument was discharged, or never acted upon, or has not the force, effect and application intended to be proven by it, in the hands of the party offering it."

Had this suit been upon the agreement in question, or to enforce some right growing out of the pork-packing operation, perhaps *Epperly* would have been estopped, however much it might have been to his disadvantage, to show that the instrument did not express its real intention, but was designed to cover a different purpose. Such, however, is not the character of this suit. And where, as in this case, the agreement comes up collaterally, merely as evidence, and is sought to be used to the injury of one of the parties, we think its true character may be shown by parol evidence.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

J. Perry, J. S. Newman and J. P. Siddall, for the appellant.
C. H. Test, J. Ryman and O. P. Morton, for the appellee.

FOOTE and Another v. LEFAVOUR and Others.

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1855.FOOTE
v.
LEFAVOUR.

Error in matter of form, although apparent on the face of a decree, is not a sufficient ground for reversing it.

An exhibit may be proved in chancery at the hearing, and hence the proof does not necessarily become part of the record.

The record of a suit in chancery stated that the cause was set down for hearing upon bill, answers and depositions. A writing under seal upon which the bill was founded was copied in the bill and also made an exhibit. The record also showed that it had been proved. *Held*, that the omission to state that the cause was set down on the exhibit as well as the bill, &c., was a mere omission in a matter of form.

ERROR to the *Marion* Circuit Court.Thursday,
June 14.

PERKINS, J.—Bill of review for errors of law appearing upon the face of the original decree. Demurrers sustained to the bill and the bill dismissed.

The decision must be affirmed. We have been able to discover no error, at least of more than mere form, in the original decree; but, says *Story*, in his Equity Pleading, p. 456, s. 411, "error in matter of form only, although apparent on the face of a decree, seems not to have been considered a sufficient ground for reversing the decree."

In this case, the original bill was filed against infant heirs, &c., for the redemption of property. The writing under seal on which the bill was founded was set forth in full and made an exhibit. The heirs were duly served with process, and a guardian *ad litem* appointed, who answered for them. The case was plainly proved; and the record presents a more than ordinary degree of accuracy of proceeding.

It is objected that the exhibit mentioned above was not proved. The answer is, that it might have been proved by parol at the hearing, and, hence, the evidence not made a part of the record; and, further, that, in point of fact, the record does show it was proved. It is clearly shown by the testimony of *Harrison*, *Phipps* and others, that they conversed with the obligor in the instrument, and that he uniformly recognized its genuineness.

It is also objected that in setting down the cause for

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hearing, it is not stated that it was not done upon said exhibit. The record states that the cause was set down upon bill, answers and depositions. Now, the exhibit in question was literally copied into the bill; it was made the subject of proof; the whole case turned upon it; it was before the Court; and the mere omission to state, in setting down the cause, that it was set down specially upon it, as well as other matters, can be no more than one of those mere "matters of form" which *Story* says will not cause a reversal.

Per Curiam.—The decree is affirmed with costs.

R. L. Walpole, for the plaintiffs.

J. Morrison and *S. Major*, for the defendants.

6	474
190	550
6	474
141	151
6	474
157	271

SIMPSON v. WILSON, Administrator.

It is incumbent upon the party asking for a new trial on account of newly discovered evidence, to show, 1. That it has come to his knowledge since the trial; 2. That it was not owing to a want of diligence that he did not know it sooner; and 3. That it would probably produce a different result.

Where a party asks for a new trial on the ground of newly discovered evidence, he must set forth in his bill of exceptions the testimony which was submitted to the jury, so as to enable the appellate Court to judge whether the result would be changed by the new testimony, or whether the testimony would be merely cumulative.

A new trial will not be granted to allow the introduction of merely cumulative testimony.

The Supreme Court will presume that a new trial was properly refused by the Court which tried the cause, when the record does not show the contrary.

Friday,
June 15.

APPEAL from the *Henry* Court of Common Pleas.

Gookins, J.—After a verdict for the plaintiff in this cause, the defendant moved for a new trial, on the ground of newly discovered evidence, upon the affidavit of himself and of the witnesses by whom he expected to make the additional proof. The Court overruled the motion

and gave judgment for the plaintiff. The bill of exceptions does not contain the evidence given on the trial.

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1855.

It is incumbent on the party asking a new trial on account of newly discovered evidence, to show, 1. That it has come to his knowledge since the trial; 2. That it was not owing to a want of diligence that he did not know it sooner; and 3. That it would probably produce a different result.

AUSEM
v.
BYRD.

On the last point we can form no opinion, because we do not know what was proved on the trial. Where a party asks for a new trial on the ground of newly discovered evidence, he must set forth in his bill of exceptions the testimony which was submitted to the jury, so as to enable the appellate Court to judge whether the result would be altered by the new testimony.

The new testimony may have been cumulative only; and if so, a new trial will not be granted; and we can not know that it is not cumulative unless we are informed what had been proved before. We must presume that the decision of the Common Pleas in refusing a new trial was right.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

W. Grose, for the appellant.

E. Johnson, for the appellee.

AUSEM v. BYRD.

Assumpsit against *A.* and *B.* on a note due five years after date, with interest payable annually, and if not paid when due, the principal to become due. *A.* was defaulted. *B.* pleaded the general issue, and a special plea alleging his readiness to pay the interest, but that the plaintiff fraudulently left the state to prevent a tender of it. Demurrer to the special plea sustained.

Held, that the plea, if viewed as a plea of tender, or an excuse for not tendering the interest, was defective for not making *proferat* of the money in Court.

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AUSEM
v.
BYRD.

Held, also, that if regarded as a plea of fraud, its sufficiency was immaterial, the facts alleged being admissible under the general issue.

On the sustaining of the demurrer to the plea above mentioned, *B.* asked leave to file another plea, alleging that the note was obtained from him by the fraudulent connivance of the plaintiff and *A.*, who represented to him that the note was payable unconditionally five years after date; that he was not a very good scholar, and that it was written in a hand which he could not readily read, &c.

Held, that the plea was no defence to the action, and that therefore leave to file it was properly refused.

Held, also, that had it been sufficient, yet the facts being admissible under the general issue, the refusal would have furnished no ground for reversing the judgment.

A note was made payable five years after date, with interest payable annually, and if not paid when due, the principal to become due.

Held, that a judgment for the principal and interest before the lapse of the five years, the interest not having been paid as stipulated, was proper.

Held, also, that the practice of entering judgment in such cases for the whole demand, but with leave to take out execution only as the amounts become due, does not prevail in this state.

In a bill of exceptions taken in a cause tried before rule 30 of the Supreme Court took effect, there was no statement that the bill contained all the evidence given at the trial. *Held*, nevertheless, that the objection that the verdict was contrary to the evidence could not be noticed.

Friday,
June 15.

APPEAL from the *Huntington* Court of Common Pleas.

GOOKINS, J.—Assumpsit by *Byrd* against *Johnson* and *Ausem*, on a promissory note for 700 dollars, dated *September 2, 1850*, due five years after date, with interest payable annually, and if not paid when due the principal to become due. The suit was brought in *March*, and the cause tried in *April, 1853*. *Johnson* made default. *Ausem* pleaded the general issue, and a special plea alleging his readiness to pay the interest, but that the plaintiff fraudulently left the state to prevent a tender of it. A demurrer to this plea was sustained. In this there is no error. If viewed as a plea of tender, or, which is the same in effect, an excuse for not tendering the interest, it is defective for not making *proferat* of the money in Court. If it is to be regarded as a plea of fraud, it is immaterial whether it was sufficient or not. The facts were admissible in evidence under the general issue. *Streeter v. Henley*, 1 Ind. R. 401.

On the sustaining of the demurrer, the defendant asked

leave to file another plea, alleging that the note was obtained from him by the fraudulent connivance of the plaintiff and *Johnson*, his co-defendant, who represented to him that the note was payable unconditionally five years after date; that he was not a very good scholar, and that it was written in a hand which he could not readily read, &c. The Court refused permission to file this plea, which is assigned for error. The defendant was not injured by a refusal to permit this plea to be filed, because it was no defence to the action, and would have availed nothing had it been allowed. For aught that appears, he had received, with *Johnson*, the consideration of the note, and the misrepresentation was of a matter apparent to the senses. The deed of one who can not read will not be avoided for that reason, unless he request that it be read to him. *Hallenbeck v. Dewitt*, 2 Johns. 404. Had the plea shown that the defendant was a surety, and had the circumstances of fraud been such as could not by reasonable diligence have been detected, it might have been sufficient. Besides, the facts were admissible in evidence under the general issue.

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v.
BYRD.

The issue was tried by jury. Verdict for the plaintiff for the amount of the note and interest. Motion for a new trial overruled and judgment.

An objection is urged to this judgment that the action was premature. It was formerly held, that debt would not lie for money payable in instalments, until the last was due. Co. Litt. 47, 292, *b.*—3 Co. 22, *a.* But assumption has always been held to lie for the recovery of money payable in instalments, before the whole was due. 1 Chit. Pl. 97. This is not an action, however, for the recovery of an instalment; it is for the recovery of the whole debt, in consequence of the non-payment of an instalment of interest. If *A.* makes a bill to *B.* for the payment of £20, viz., £10, &c., and hereby covenants and grants with *B.* that if he makes default in either of the said payments, he will then pay what of the whole shall be unpaid, after default of the first day, debt lies for the whole. Bac. Ab., tit. Conditions, P. 3, p. 669, note *a.*

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MIX.

It is further insisted, that if the plaintiff was entitled to judgment for the whole, it should have been with leave to take out execution only as the amounts became due. We have no such practice. Such a practice prevails in *England*, upon obligations like the present, but it is under the statute of 8 and 9 *Wm.* 3, c. 11, s. 8, which is not in force in this state. A similar practice prevails, we think, in *Pennsylvania*, and perhaps in other states, under special statutes, but it is a proceeding unknown to the common law.

We can not notice the objection taken to the verdict as being against evidence. There is no statement in the bill of exceptions that it contains all the evidence given at the trial.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

J. R. Coffroth, for the appellant.

J. R. Slack, for the appellee.

CECIL v. MIX and Others.

A blank indorsement of a note, in the absence of evidence showing when it was made, will be presumed to have been made at the date of the note.

A. and B., of *Lafayette*, being indebted to *C.*, who resided in a different county, *C.* sent to an agent at *Lafayette* a request to secure the debt. The agent returned a note (which was made payable at the *Lafayette* branch of the state bank) signed by *A. and B.* and indorsed in blank by *D.* There was no other evidence of the date of the indorsement. *C.* having afterwards indorsed his name in blank below *D.*'s, delivered the note to the plaintiff. *Held*, that *D.* was to be regarded as one of the makers.

Friday,
June 15.

ERROR to the *Tippecanoe* Circuit Court.

STUART, J.—Assumpsit on a promissory note averring, as to *Mix*, that he became one of the makers by signing his name on the back. The averment is, that on the day

and year on which the note was made, at, &c., the defendant *Mix* signed his name in blank on the back, and that so signed the note was delivered to the payee, *John P. Baker*. *Baker* subsequently assigned to *Cecil*. Trial by the Court. Finding and judgment for the defendants. The evidence is all properly embodied in the record.

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The evidence of *John P. Baker*, the payee, introduced as a witness for and released by *Cecil*, so far as it bears on this point, is brief, viz., "that he was the payee of the note; that *Thompson* and *Rowan* owed witness a debt for that amount for lumber; that the witness, living in another county, sent to one *Halliday*, of *Lafayette*, to secure the debt for him; that *Halliday* returned the note to witness, with the names of *Thompson* and *Rowan* and said *James Mix*, the same as they now appear thereon.

The note and indorsements read thus, viz.:

"§259. *Lafayette, February 7, 1849.* Four months from date, we promise to pay *John P. Baker* two hundred and fifty-nine dollars, for value received, without benefit of valuation or appraisement laws; negotiable and payable at *Lafayette* branch, state bank of *Indiana*. [Signed] *Thompson* and *Rowan*." "Indorsed, *James Mix, John P. Baker*."

This was all the evidence bearing on that question.

The only question presented is as to the liability of *Mix*. Was it primary or secondary? Was he one of the makers of the note or only an indorser? The authorities on this question were fully examined by judge *Dewey*, in *Wells v. Jackson*, 6 Blackf. 40. According to the *Massachusetts* authorities, the liability of *Mix* would be that of surety on the original contract, as much as though his name had been on the face of the note; but the presumption is open to explanation as to the real intent of the indorsement. In *New-York* such indorsement is held to be *prima facie* evidence of secondary liability only, unless it be shown by other evidence than the mere indorsement, that his object was to give the maker of the note credit with the payee.

In regard to negotiable paper, this Court, in the case cited, inclined to the latter principle. "The deduction," says the Court, "which we draw from these authorities is,

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Mix.

that the blank indorsement of unnegotiable paper, made at the date of the contract, and unexplained by extrinsic testimony, confers upon the payee the authority to hold the indorser liable on the original contract as a surety; and that a similar unexplained indorsement of negotiable paper, renders the indorser liable only as indorser, with the ordinary rights and privileges incident to that character; but that, in either case, the liability intended to be assumed may be explained, and the *prima facie* responsibility be changed to one of another kind."

Adhering to the principles thus established, it but remains to inquire how they affect the liability of *Mix*.

There are two circumstances which seem to define the position of *Mix* beyond controversy. It is shown in evidence that when the note was delivered to the payee, and before the latter had assigned it to *Cecil*, *Mix's* name was indorsed thereon. There is no date to the indorsement, and the presumption therefore is, in analogy to assignments, that it was done at the date of the note.

There is nothing in the case to repel this presumption. This blank indorsement of a note negotiable under our statute, R. S. 1843, p. 576, s. 6, (and much more under the authority of *Wells v. Jackson*, if the instrument were not negotiable,) made at the date of the note and before its delivery, sufficiently indicates, we think, the intention of *Mix* to give the other makers credit with *Baker*, the payee.

The other circumstance is closely connected with the time and manner of signing. It is the position of his name. The note and indorsements are set out in the record; as to the latter thus indorsed, "*James Mix, John P. Baker.*" In the case of *Wells v. Jackson*, the principles of which we adopt in the determination of this case, *Jackson's* name stood the last of three indorsers. And the Court lay stress upon this fact, as a ground of presumption that he had "placed his name on the bond in the character of an ordinary indorser—looking to the responsibility of those whose names preceded his, including the payee and maker." Here *Mix's* name stands first on the back of the note. Taking these two circumstances together, the time

the indorsement was made and the position of the indorsement itself, leaves, we think, no doubt of the intention of *Mix*, the indorser, and of *Baker*, the payee, as to the liability assumed by *Mix*. *Baker* had every reason to regard him as a party to the original contract. *Cecil*, the assignee, has properly so regarded him in this action.

We are clearly of opinion that the evidence, in the light of the authorities cited, shows the liability of *Mix* to be of this primary character, and that therefore the judgment should be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. S. Orth and *E. H. Brackett*, for the plaintiff.

R. C. Gregory and *R. Jones*, for the defendants.

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1855.

DAVIS
v.
COX.

DAVIS v. COX and Others.

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Where the land intended to be embraced in a mortgage is misdescribed, the mortgagee must have the instrument reformed before he can proceed to foreclose.

Bill for foreclosure against subsequent purchasers. The land intended to be embraced in the mortgage was misdescribed therein but correctly described in the deeds to such purchasers. The bill did not allege the misdescription nor seek to have the mortgage reformed; but the evidence showed the misdescription and tended to prove that the purchasers had knowledge of it when they bought the land. The Supreme Court ordered the bill to be dismissed without prejudice, &c.

ERROR to the *Bartholomew* Circuit Court.

Friday,
June 15.

STUART, J.—Bill in chancery by *Davis* against *Cox*, the mortgagor, and *Wood*, *Larkin* and *Wood*, subsequent purchasers, to foreclose a mortgage.

The land as described in the bill, is the south-west half of the south-west quarter of section *fifteen*, in township nine, of range seven east, &c.

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The mortgage, dated *September 18, 1846*, and recorded *December 19, 1846*, was given to secure the payment of 200 dollars, which, as elsewhere appears, was part of the consideration for the land mortgaged, though not so alleged in the bill.

Cox and wife made default. *Wood, Larkin* and *Wood* answered. They admit the mortgage on the *south-west* half of the *south-west* quarter of section *fifteen, &c.*, as alleged in the bill; but they set up that on the 17th day of *July, 1849*, *Wood* and *Larkin* were seized in fee of the *west* half of the *south-west* quarter of section *fifteen*, in township nine, of range seven east, containing 80 acres; and on the day last named, they, *John Wood* and *Joseph Larkin*, in consideration of 600 dollars paid, &c., sold and conveyed the said tract of land to the other respondent, *Ebenezer Wood*; that this deed, dated *July 17, 1849*, was recorded *October 9, 1849*; that the purchase by *E. Wood* from *Wood* and *Larkin* was *bona fide*; and that prior to the consummation of the contract, *E. Wood* had no knowledge, information or notice that the said *Davis* had any claim, interest or lien on the land. He is silent as to his belief. He admits, however, that when the purchase was made by him, he was informed that *Davis* claimed to have a mortgage upon a different parcel of land, viz., the *south-west* half of the *south-east* quarter of section *fifteen, &c.*; that on the 16th of *November, 1846*, *Cox* conveyed in fee to *Wood* and *Larkin* for 600 dollars the same land conveyed by the latter to *E. Wood*. The deed from *Cox* to *Wood* and *Larkin* is alleged to have been duly recorded, and that it is lost, &c. They further deny that at the time of the purchase from *Cox*, they had any knowledge, information or notice that *Davis* claimed a lien or incumbrance upon it, &c. *E. Wood* claims, therefore, as a *bona fide* purchaser.

Davis filed a replication. Had he, instead of that, pressed the respondents with proper interrogatories in his bill, and proper exceptions to their answer, tending to search out the extent of their knowledge, information, *hearsay* and *belief*, he would perhaps have reached a different result.

The witness who drew the mortgage describes accurately in his deposition the land intended to be mortgaged. Here were the means, upon a proper case made, to have the instrument reformed; and then he could have proceeded to foreclose. *Hunt v. Freeman*, 1 Ohio R. 490.—*Young v. Miller*, 10 *id.* 85.—*McLouth v. Rathbone*, 19 *id.* 21.—*Lindley v. Cravens*, 2 Blackf. 426.—3 Ind. R. 183.—*Gray v. Woods*, 4 Blackf. 432.—1 Story's Eq., ss. 110 to 183.

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Cox.

Singleton, another of *Davis'* witnesses, states in his deposition that *E. Wood* came to the auditor's office, inquiring about a piece of land he had bought from *Wood* and *Larkin*. He requested *Singleton* to look it up for him, adding that it could be found by a mortgage *Cox* had given to the man he bought from for *some part of the purchase-money, as he (Wood) understood it*; said he wished to know the amount of the mortgage for the purpose of paying it off; but finding the mortgage on the wrong tract of land, he said he should not pay it.

The deposition of *Terrell*, recorder, is to the same effect. His deposition further discloses that the land deeded by *Davis* to *Cox* and by *Cox* to *Larkin* and *Wood*, was the only land then or since owned by *Cox*; that *Cox's* mortgage to *Davis* was on a part of section *thirteen* instead of *fifteen*.

The correct description of the tract as deeded by *Davis* to *Cox*, and presumed to be intended by the mortgage, was the west half of the south-west quarter of section *fifteen*, in township nine, of range seven east. The mortgage, which is made an exhibit, is on the *south-west* half of the south-west quarter of section *thirteen*, in township nine, of range seven east.

On final hearing the bill was dismissed.

Counsel for the complainant make the same mistake in their argument as is made in the bill. Indeed they argue as though they were not aware of the doctrine of the reformation of instruments.

It is urged that *Wood* knew the money to secure which the mortgage was given, was part of the unpaid purchase-

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COX.

money due from the vendee to the vendor. Very true, that is the state of facts proved; and the pleader should have framed his bill accordingly. It is not what the complainant alleges simply, without proving it, nor what he proves without having alleged it, that is the measure of his remedy; but what he alleges and proves.

Here there were two grounds which the pleader, after reforming the mortgage, might have assumed—framing his bill with a double aspect, and thus placing success beyond the reach of contingency. For if the mortgage was void, so as to prevent a recovery in that direction, it was void for every purpose, and could not be set up as a waiver of the vendor's lien for the purchase-money.

In *Lindley v. Cravens*, *supra*, the bill had been dismissed in the Court below; but that decree was reversed in this Court, and the bill ordered to stand for amendment. We can not do that here; because the one stood on demurrer, the other on final hearing.

But in the case at bar, the bill should have been dismissed without prejudice.

In a late case in *Ohio*, it was held that when a deed was evidently designed to convey a fee, a Court of Equity will not lend itself to defeat the intent. If such deed, on a proper case made, would be reformed in equity, no person who would be bound by it when reformed, can found an equity upon its defects. *Williams v. The Presbyterian Church et al.*, 1 Ohio State R. (1853) 477.

Perhaps as a corollary to this doctrine, we might reverse the decree below, and order the bill to stand for amendment. In either case the costs fall on *Davis*, and it can make no material difference.

Per Curiam.—The decree is reversed at the costs of the plaintiff. Cause remanded, with instructions to the Circuit Court to dismiss the bill without prejudice, and to allow the parties to withdraw their papers, &c.

W. Herod and S. Stansifer, for the plaintiff.

W. F. Pidgeon and I. Blackford, for the defendants.

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1855.

KENNEDY v. THE STATE.

KENNEDY
v.
THE STATE.

Indictment, charging the prisoner, *Thomas Kennedy*, with murder in the first degree. Verdict, "We, the jury, do say and find that *Thomas Kennedy* is guilty, in manner and form as he stands charged in the indictment, and that he shall be imprisoned in the state prison, and kept at hard labor during life." The act of 1843, in force when the verdict was rendered, provided, that upon an indictment for murder in the first degree, the jury might find the defendant not guilty of the crime in the degree charged in the indictment, and might find him guilty of such murder in the second degree; or they might find him guilty of manslaughter. *Held*, that the verdict showed, with sufficient certainty, that the prisoner was found guilty of murder in the first degree.

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When, under the act in question, the jury, under a single count charging murder in the first degree, find the prisoner guilty of murder in the second degree, the verdict should specifically name the offence of which he is found guilty.

APPEAL from the *Hancock* Circuit Court.Friday,
June 15.

DAVISON, J.—Indictment, containing a single count, charging murder in the first degree. Verdict, "we, the jury, do say and find that *Thomas Kennedy* is guilty in manner and form as he stands charged in the indictment, and that he shall be imprisoned in the state prison and kept at hard labor during life." Motions for a new trial and in arrest were denied, and judgment given on the verdict.

An act in force when this verdict was rendered, provides, that "upon an indictment for murder in the first degree, the jury may find the defendant not guilty of the crime in the degree charged in the indictment, and may find him guilty of such murder in the second degree; or they may find him guilty of manslaughter." R. S. 1843, p. 988, s. 14. From this it will be seen that an indictment for murder in the first degree, is, under the above provision, really an indictment for one of three distinct crimes. Hence it is contended that the verdict in this case is bad for uncertainty; that it should have designated the crime for which the defendant was found guilty, in order that the Court might know of what offence he was convicted.

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KENNEDY
V.
THE STATE.

It has been decided that "when there are several counts in an indictment, charging different grades of the same offence, with punishments differing in degree only, but of the same nature, and the jury return a general verdict of guilty, the judgment will not be arrested. * * * That on the trial of an indictment containing two counts—one for murder and the other for manslaughter—and a general verdict of guilty found by the jury, the defendant would be punished for the higher grade of offence, for the reason that the jury having found the defendant guilty generally, the presumption of law is, that they intended to find him guilty of the highest offence with which he was charged in the indictment; murder and manslaughter being the same species of crime, to-wit, homicide, but differing only in the degree of guilt." *The State v. Downer*, 8 Verm. R. 424.—*The State v. Hooker*, 17 id. 658.—*Bullock v. The State*, 10 Georgia R. 46.

So it has been held that each count in the indictment is a substantive charge, and if the finding conform to any one of them which in itself will support the verdict, it is sufficient to give judgment. *The United States v. The Pirates*, 4 Peters' Cond. R. 636.

These decisions, it is true, relate to indictments which actually contained two or more counts. Still, however, they are applicable to the case before us, because the present indictment, though it contains a single count, in effect embraces three, viz., a count for murder in the first degree, for murder in the second degree, and for manslaughter; the two last by force of the statute.

Besides, the statute itself seems to point out the duty of the jury when the evidence, though sufficient to prove the crimes of murder in the second degree or manslaughter, falls short of establishing the guilt of the defendant as he is specifically charged in the indictment. When this occurs, the verdict would be defective unless it named the offence; because, in such case, the record would contain no express designation of the crime of which the defendant was convicted. But in the verdict under consideration we perceive no want of certainty. The jury "find

the defendant guilty in manner and form as he stands charged." This evidently refers to the specific charge contained in the indictment. Of what, then, does he stand charged? Why, of murder in the first degree. There is, indeed, no ground of objection to the verdict.

Per Curiam.—The judgment is affirmed with costs.

T. D. Walpole, R. L. Walpole and R. A. Riley, for the appellant.

D. S. Gooding, for the state.

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1855.

CHRISMAN
v.
MELNE.

CHRISMAN and Others v. MELNE.

A plea rejected on motion is no part of the record unless made so by bill of exceptions.

If in a suit tried on the general issue, a judgment has been rendered for the plaintiff, the judgment will not be reversed merely because a demurrer to a special plea was erroneously sustained, if the matter specially pleaded was admissible evidence under the general issue.

A motion in arrest of judgment is in effect an admission that the verdict is in accordance with the weight of evidence, and when it precedes a motion for a new trial, the latter motion is unavailing.

ERROR to the *Marion* Court of Common Pleas.

Friday,
June 15.

DAVISON, J.—Assumpsit by *George Melne*, the indorsee of *Elijah Tyner*, against *William Chrisman* and others, parties to a bill of exchange. The bill, which is dated August 23, 1848, was drawn by *Chrisman* in favor of *James Leary*, for 600 dollars, payable in one hundred and twenty days, at the office of the *Ohio Life Insurance and Trust Company, Cincinnati*, accepted by *Banner Lawhead*, and indorsed by *Leary* and *Tyner*.

Chrisman and *Leary* were defaulted; but *Lawhead* and *Tyner* appeared. *Lawhead* pleaded the general issue, and *Tyner* the general issue and five special pleas.

No question has been raised as to the third, fourth and sixth pleas. They will not, therefore, be further noticed.

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CHRISTMAN
v.
MELZER.

The second plea is copied in the transcript. In form it is a plea of non-assignment, and is said to have been rejected on the plaintiff's motion; but no exception was taken to the ruling of the Court; and "a plea rejected on motion is no part of the record, unless made so by a bill of exceptions." *Henderson v. Reed*, 1 Blackf. 347. Hence the second plea is not properly before us.

The fifth plea avers, that the bill sued on was, on the 20th of *January*, 1849, the property of the branch bank at *Indianapolis*; that *Tyner*, on that day, fully paid to said branch the principal, interest and costs then due on said bill; and that afterwards, on the same day, the plaintiff obtained possession of it by fraud, without consideration, &c. To this plea a demurrer was sustained.

We perceive no ground in support of this decision. Still the error in sustaining the demurrer is no cause for reversing the judgment. The evidence admissible under that plea was also admissible under the general issue. The cause has been tried under the general issue, and the defendant has had an opportunity to introduce the same evidence which he could have introduced under the fifth plea. The decision of the Court did not, therefore, injure him, and he can not complain of it. *Shanklin v. Cooper*, 8 Blackf. 41.—*Cohee v. Cooper*, *id.* 115.

The cause was submitted to the Court for trial, and the Court found for the plaintiff 706 dollars.

The record contains a bill of exceptions, which professes to set out all the evidence given on the trial, and avers that upon the finding of the Court the defendants moved in arrest of judgment and for a new trial, which motions the Court overruled, and rendered judgment, &c.

We have repeatedly decided that a motion in arrest is in effect an admission that the verdict is in accordance with the weight of evidence; and when it precedes a motion for a new trial, the latter motion is not available. *Rogers v. Maxwell*, 4 Ind. R. 243.—*Bepley v. The State*, *id.* 264.—*Sherry v. Ewell*, *id.* 652.—*Tuberril v. Stamp*, 2 Salk. 647.—1 Sellen Pr. 505.—*Steph. Pl.* 126.—2 Ind. R. 117.

There being no sufficient cause for the motion in arrest, May Term,
1855.
the judgment must be affirmed.

Per Curiam.—The judgment is affirmed with costs.
J. Morrison and S. Major, for the plaintiffs.

ESTEP
v.
MORTON.

ESTEP v. MORTON.

A recoupment of damages was not allowed, under the former practice, in the absence of a plea, counter-claim, or notice to the adverse party showing the intention to recoup.

ERROR to the *Wayne* Court of Common Pleas.

*Friday,
June 15.*

PERKINS, J.—*Morton* sued *Estep* for the value of certain timber trees, and recovered in a trial upon the general issue.

On the trial in the Common Pleas Court, *Estep* proposed to show that he had taken the trees sued for under a special contract by which he was to have had a larger number; that he was prevented by the plaintiff from taking them, and had thereby sustained damage, the amount of which he offered to prove and recoup from the plaintiff's demand. The Court refused to permit him to recoup his damage, on the ground that he had placed upon the record no plea, counter-claim, or notice entitling him to do so.

The case was tried under the old system of practice.

We think the Court did right. In these cases it is proper that the record of the pleadings should show what was litigated between parties, for their protection in subsequent suits. Under the new code a counter-claim would be necessary.

It is also objected that the evidence does not support the judgment. We think it tends to support it.

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1855.

MURPHY
v.
THE STATE.

Per Curiam.—The judgment is affirmed with costs.
J. Perry, for the plaintiff.
J. S. Newman and *J. P. Siddall*, for the defendant.

MURPHY v. THE STATE.

The prisoner, indicted for arson in the *Marion* Circuit Court, applied for a continuance of the cause, to procure the testimony of a witness residing in *Cincinnati* to his good character. Twenty-one days had elapsed between the period of the prisoner's arrest under the indictment and the application for the continuance, and he had meanwhile made no effort to obtain the testimony. There is a communication, twice a day, between *Indianapolis*, the county-seat of *Marion* county, and *Cincinnati*, by railroad. *Held*, that the application was properly refused.

The Court is charged with the duty of giving the law to the jury in criminal as well as in civil cases, though in the former the jury are the judges of the law and the fact.

It is not error for the Court, on the trial of a criminal prosecution, to refuse to permit counsel to read from law books in their argument to the jury.

After the conviction of a prisoner for arson, in setting fire to a building in *Indianapolis*, he moved for a new trial, to enable him to prove an *alibi* by one *A.*, who had not been examined as a witness. The affidavit stated that the prisoner had slept with *A.*, on the night the building was burned, in *Indianapolis*, &c. It admitted that the prisoner remembered the fact distinctly before the trial, but alleged that he had forgotten *A.*'s name, and had, therefore, made no effort to obtain his testimony. *Held*, that the Court correctly overruled the motion.

Friday,
June 15.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Prosecution for arson. Conviction, fine, and sentence to the state prison.

Three errors are assigned: 1. In refusing to continue the cause. 2. In refusing to permit counsel to read from law books in their argument. 3. In refusing to grant a new trial.

1. The continuance was asked to obtain the testimony of bishop *Purcell* and others to the good character of the

defendant. No effort had been made to obtain it, though there had been time enough for the accomplishment of the object between the arrest under the indictment and the trial. From three to four hours, by bi-daily conveyances, puts the citizen here in communication with Cincinnati, the residence of bishop Purcell and the other witnesses named. The defendant had had twenty-one days.

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1855.

MURPHY
V.
THE STATE.

2. The Court is charged with the duty of giving the law to the jury in criminal as well as in civil cases, though in the former the jury are the judges of the law and the fact. *Carter v. The State*, 2 Ind. R. 617. The Court would not be bound to sit and hear counsel read all the numerous treatises on criminal law to the jury; and if not all, why any? Where should the Court stop?

3. The new trial was asked to enable the defendant to prove an *alibi* by the testimony of one *Huston*, who had not been examined on the trial had.

The affidavit states that the defendant slept with *Huston* the night the building in question in the case was burned, at what appears to be *Huston's* boarding-house, in the southern part of the city of *Indianapolis*. He admits that he knew and remembered the fact distinctly before the trial that had taken place, but had forgotten *Huston's* name, and, hence, made no effort to obtain his testimony.

It would seem to have been a very easy matter to have ascertained the name, through his counsel or some of the bailiffs, by a few minutes' walk, or by sending to the boarding-house. The excuse does not appear sufficient.

Per Curiam.—The judgment is affirmed with costs.

T. D. Walpole, R. L. Walpole and D. Wallace, for the appellant.

J. W. Gordon, for the state.

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1855.

WOODWARD v. THE STATE.

WOODWARD

v.

THE STATE. A negro is competent to testify, under the act of 1853, on the trial of a criminal charge against a negro.

Saturday,
June 16.

APPEAL from the *Hendricks* Circuit Court.

Per Curiam.—*Woodward* was indicted for an assault and battery with intent to murder. He is a colored man, and the assault and battery charged was upon a white man. On his trial he offered a colored man as a witness in his behalf, but the Court refused to hear the witness testify.

The statute on the subject is as follows:

"No *Indian*, or person having one-eighth or more of negro blood, shall be permitted to testify as a witness in any cause in which any white person is a party in interest." Laws of 1853, p. 60.

The question is, is a person upon whom a crime has been committed, in any sense a party in the cause prosecuted by the state against the criminal? If so, neither the state nor the defendant can call, in such cases, a colored witness, for the exclusion is general as to all parties. Is the interest contemplated a pecuniary or legal interest, or one of feeling merely? Suppose, in this case, the person assaulted had been actually killed, and *Woodward* had been on trial for murder, instead of the attempt to murder, would the dead man or his representatives have been a party or parties, in the statutory sense? If not, shall the negro have the benefit of testimony when he succeeds in killing, but not when he stops short of that point?

We do not think the state was contemplated as a person of any particular color by the statute. We think the Court erred in rejecting the witness.

The judgment is reversed. Cause remanded, &c.

J. L. Ketcham, for the appellant.

D. C. Chipman and *J. W. Gordon*, for the state.

SLAUGHTER *v.* KIMBLE.

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1855.

KENT
v.
SPEARS.

Saturday,
June 16.

APPEAL from the *Franklin* Court of Common Pleas.

Per Curiam.—This case turns upon the weight of evidence, as to whether a sale of a lot of wheat had taken place. It depended upon what really were the terms of a parol agreement, subsequent notice, reasonable time, &c.

We can not say the finding upon the evidence was clearly wrong.

The judgment is affirmed with costs.

J. D. Howland, for the appellant.

J. Ryman, for the appellee.

KENT *v.* SPEARS and Others.

ERROR to the *Warren* Circuit Court.

Saturday,
June 16.

Per Curiam.—Assumpsit for a fraction over 94 dollars, upon a written instrument. Pleas, non assumpsit, payment, set-off, &c. Issues of fact under which the case was fully triable. Trial and judgment for the plaintiff. No motion for a new trial. No questions on the admission or rejection of evidence. There is no question before this Court.

The judgment is affirmed, with 10 per cent. damages and costs.

R. A. Chandler, for the plaintiff.

B. F. Gregory, for the defendants.

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CARTER v. McCLELLAND.

ADDLEMAN
v.
ERWIN.

Monday,
June 18.

APPEAL from the *Morgan* Circuit Court.

Per Curiam.—This case is on the weight of evidence. One party agreed to pay the other certain sums, when certain work on a house was done by the other. Suit for the money. Controversy about the work and whether done. The party appears to have accepted it. A compromise as to it had taken place, &c. The jury might infer the right to recover.

We can not disturb their finding.

The maker of the note assigned was perfectly worthless, and not worth suing.

The judgment is affirmed, with 1 per cent. damages and costs.

W. R. Harrison, for the appellant.

J. W. Gordon, for the appellee.

ADDLEMAN v. ERWIN and Another, Administrators.

In a cause tried since the R. S. 1852 took effect, a motion for a new trial, which is not in writing, can not be noticed.

Where the issues of fact in a cause are submitted to the Court for trial, either party may require the Court to make a special statement of the facts and the questions of law decided thereon; and by then excepting to the decision, such party may properly prepare the case for review in the Supreme Court.

Monday,
June 18.

APPEAL from the *Wayne* Court of Common Pleas.

Per Curiam.—Assumpsit by *Addleman* against *Erwin* and others, for money paid, &c. Demand denied. Trial by the Court and judgment for the defendants. The trial was in 1854, under the new practice. No evidence offered was rejected, and none given was excepted to.

A motion for a new trial was made, but not being in writing, it could not be noticed. *McKinney v. Springer*, ante, p. 453. Another course might have been pursued to get the questions made below before this Court. The party might have required the Court to make a special statement of the facts and the questions of law decided thereon, and then excepted to the decision, and thus prepared the case for this Court. 2 R. S., 115, s. 341. This was not done, and the record presents no question for our consideration.

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The judgment is affirmed with costs.

J. Perry, for the appellant.

W. A. Bickle, for the appellees.

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When several persons are jointly indicted, but separately tried, either, if he consents, is competent to testify on behalf of the other.

APPEAL from the *Marion* Circuit Court.

Saturday,
July 14.

GOOKINS, J.—The appellant was indicted jointly with *James Broughard* and *William Hinesley*, for burglary. He was separately tried and convicted at the *December* term, 1854, of the *Marion* Circuit Court.

On the trial he offered as a witness in his behalf *Hinesley*, who was indicted with him, who had not been convicted, and who consented to testify on behalf of *Everett*. He was objected to by the state as incompetent, and his testimony was excluded, for the reason assigned.

The statute regulating practice in civil suits has this provision: "No person offered as a witness shall be excluded from giving evidence in any judicial proceeding, by reason of incapacity from crime or interest; but this sec-

May Term, 1855. tion shall not render competent a party to an action," &c.
2 R. S. 1852, p. 80, s. 238.

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The statute regulating the practice in criminal cases, has the following section: "The following persons are competent witnesses: 1st. All persons who are competent to testify in civil actions. 2d. The party injured by the offence committed. 3d. Accomplices, when they consent to testify." 2 R. S. 1852, 372, s. 90.

It is also provided, that "when two or more defendants are indicted jointly, any defendant requiring it must be tried separately;" *id.*, 375, s. 105; and when tried jointly, a defendant against whom sufficient evidence does not appear to put him on his defence, may be discharged by the Court, for the purpose of giving testimony for his co-defendant.

Under these statutes, we think *Hinesley* was a competent witness. If he could have been excluded at all, it was because he was a party to the suit; but as the right to a separate trial is absolute, when the defendants sever, it is as much a separate suit, in respect to each, as if they were separately indicted. The 105th section does not apply to the case; that refers to joint trials.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

R. L. Walpole, D. Wallace and T. D. Walpole, for the appellant.

D. C. Chipman and J. W. Gordon, for the state.

6	496
127	590
6	496
145	350

THE GOVERNOR V. NELSON.

A clerk of the Circuit Court elected to supply a vacancy, under the constitution of 1851, holds his office for the full term of four years from the period of his election.

Section 7, of chapter 115, 1 R. S. 1852, p. 512, so far as it assumes to regulate or abridge the term of office of persons elected to the office of clerk of the Circuit Court, where vacancies have occurred, is in conflict with the provisions of the constitution on that subject and void.

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Saturday,
July 14.

APPEAL from the *Marion* Circuit Court.

STUART, J.—Motion for a *mandamus*. The affidavit on which the motion was based, sets up, that in *June*, 1852, one *Joseph Sinclear* was duly commissioned clerk of the *Allen* Circuit Court, to serve as such for the term of seven years; that in *September*, 1854, *Sinclear* died, and *Nelson* was duly appointed by the board of commissioners of *Allen* county to fill the vacancy which had thus occurred; that *Nelson* was qualified, entered upon the duties of the office, and served, &c., till the next general election in *October*, 1854, and until the commission thereafter more particularly referred to; that at said election *Nelson* was duly elected clerk of the *Allen* Circuit Court, a certificate of his election forwarded to the proper office, and on the 14th of *March*, 1855, a commission issued to him as clerk of the *Allen* Circuit Court, for the term of seven years from the 15th of *June*, 1852; that he took the oath required by law, and entered upon the duties of the said office under said commission; that he had, on the 28th of *June*, 1855, called upon governor *Wright* to have the commission corrected, or a new commission issued to him as such clerk for the term of four years, &c., which the governor declined and refused to do, &c. *Nelson* therefore prays a *mandamus* against the governor to show cause, &c.

An order of the Circuit Court was accordingly issued in the alternative, to correct, &c., or show cause, &c.

To this mandate governor *Wright* returned, that he admitted the facts stated in *Nelson's* affidavit, but that he was informed and believed, and accordingly submitted to the Court, whether, under the constitution and the acts of the general assembly, particularly an act approved *May* 13, 1852, entitled "an act touching vacancies in office, and filling the same by appointment," the executive is not bound to issue commissions as thereby directed, viz., "every person elected to fill any office in which a vacancy

May Term, 1855. *has occurred, shall hold such office for the unexpired term thereof;" 1 R. S., 512; that the executive department had uniformly been governed by the said law since it took effect; that the commission now shown to him had not been issued in conformity with the order of the executive to the secretary of state; that *Sinclear's* term would have expired on the 15th of *June*, 1856, under the constitution; and that the instructions of the executive to the secretary were to issue a commission to *Nelson* for that unexpired term.*

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To this return *Nelson* demurred, and the Court sustained the demurrer; and the governor failing to make further return, a peremptory *mandamus* was awarded. The governor appeals.

The only question presented is, whether *Nelson* should have been commissioned to fill *Sinclear's* vacancy, viz., for four years from the first day of *November*, 1851, when the new constitution took effect, or for four years from the day of the general election in *October*, 1854, when he was elected clerk by the people of *Allen* county. The governor insists that *Nelson* was elected to fill the vacancy. *Nelson* claims the full term of four years from the date of his election.

It is proper to observe, that it appears from *Nelson's* petition there is no wish on the part of governor *Wright* to harass *Nelson* in relation to his office; but only to settle a doubtful question of construction. The governor, it seems, deems it his duty to conform to the acts of the legislature until the judicial department determine whether the law is in accordance with the constitution. He has, therefore, commissioned in compliance with sec. 7, c. 115, 1 R. S., 512, to hold for the unexpired term.

The office of clerk of the Circuit Court is one recognized in the constitution. The second section of article 6, under the head of "administrative," provides, among other things, for the election of a clerk of the Circuit Court by the people, who shall continue in office four years, and shall not be eligible to such office more than eight years in any period of twelve years. 1 R. S., 58. The 9th sec-

tion of the same article provides that vacancies in county offices shall be filled in such manner as may be prescribed by law. The 10th section provides that the general assembly may confer upon the boards doing county business, powers of a local, administrative character. 1 R. S., 59. Section 4, of chapter 115, 1 R. S. 1852, authorizes the commissioners to fill the vacancies in county offices, to hold until the next general election. The 8th, 10th and 12th sections of the schedule of the constitution will be found, on examination, to contain nothing bearing on the questions before us, and therefore need not be quoted.

Under these constitutional provisions, we are of opinion that the term of *Nelson's* office was for four years from the period of his election in *October*, 1854, and that his commission should have run accordingly. We are confirmed in this view by another provision of the constitution, to which counsel have not referred. The 11th section of article 2 provides, that "in all cases in which it is provided that an office shall not be filled by the same person more than a certain number of years continuously, an appointment *pro tempore* shall not be reckoned a part of that term." 1 R. S., 47. As to clerk of the Circuit Court, it has been seen that he may be elected for a term of four years. The same person may fill that office for more than four years continuously, viz., for eight years. 1 R. S., 58, *supra*. And it is a *pro tem.* appointment, and not an election, that is not to be accounted a part of the term during which the same person may hold the office for consecutive years. Thus *Nelson's pro tem.* appointment by the board of commissioners of *Allen* county, is not to be taken as any part of the period during which he may hold the office. But his holding by virtue of an election, seems to us must be so taken. For the second section of article 6 does not provide for part of a term. It contemplates a full term as the result of each popular election. "He shall continue in office four years; he shall not be eligible more than eight years," &c., clearly indicate two full terms. If *Nelson's* term, under the election of *October*, 1854, were only for the unexpired part of *Sinclear's* term, as the commission

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issued in pursuance of the act of the general assembly above quoted was intended to run, then *Nelson's* first term could not be four years, nor two terms eight years. For though *Sinclair* was commissioned for a term of seven years from *June*, 1852, yet the taking effect of the new constitution abridged his term of office. 10th specification of the schedule, 1 R. S., 71. *Sinclair's* term, commencing, under the constitution, *November* 1, 1851, and ending *November* 1, 1855, would give *Nelson*, if elected to fill the vacancy, only a little more than one year, instead of four years, to serve. And he would not be eligible to a third term, for that would give him more than nine consecutive years.

Thus, whichever way tested, the hypothesis of filling a vacancy by an election, to hold only for the unexpired term, wholly fails to conform to the clear intent of the constitution. The requirements of the constitution itself would thus be rendered conflicting and incongruous. But on the hypothesis that every election of clerk, at, &c., is for a full term, the several parts fall in harmoniously. We therefore conclude, that to conform to the constitution, the clerks of the Circuit Court elected by the people, are entitled to a full term of four years, and not to be regarded as filling a vacancy of any shorter period.

The 7th section of chapter 115, 1 R. S., 512, so far as it assumes to regulate or abridge the term of office of persons elected to the office of clerk where vacancies have occurred, is in conflict with the provisions of the constitution on that subject, and must be declared void.

Nelson is therefore clearly entitled to a commission for the full term.

Per Curiam.—The order of the Circuit Court, awarding a peremptory *mandamus*, is affirmed with costs.

The Governor, in person.

J. Morrison, *C. A. Ray* and *J. T. Morrison*, for the appellee.

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So much of the act "to prohibit the manufacture and sale of spirituous and intoxicating liquors," &c., approved *February* 16, 1855, as is prohibitory of the right to manufacture such liquors, and also so much thereof as relates to the establishment of agencies and the appointment of agents to sell such liquors, is unconstitutional and void.

APPEAL from the *Marion* Court of Common Pleas.

Thursday,
December 20.

PERKINS, J.—*Roderick Beebe* sued out from the *Marion* Common Pleas a writ of *habeas corpus* to obtain deliverance from imprisonment in the county jail. The sheriff, being jailer, made return to the writ that he held said *Beebe* in custody by virtue of *mittimus* to him directed by the mayor of *Indianapolis*, reciting that said *Beebe* had been convicted and fined under the provisions of the act to prohibit the manufacture and sale, except, &c., of intoxicating liquors, passed by the legislature of 1855, approved on the 16th of *February*, and published in all the counties of the state on the 17th of *May*, and appointed to take effect on the 12th of *June* of that year, and had not paid or replevied the fines, &c.

The alleged offences were shown to have been committed after the 12th of *June*.

Upon this return, *Beebe* moved the Court to discharge him from custody, but the Court overruled the motion. The ground of the motion, as stated, was, that the liquor act of 1855 was unconstitutional and therefore void; that a conviction under it was consequently invalid; and that, as the facts of the case appeared upon the face of the return, it showed that *Beebe* was illegally restrained of his liberty.

Counsel on both sides concede in argument that the record presents the question of the validity of, at least, what

Note.—The act creating the office of Reporter requires that each volume of reports shall contain not less than 600 pages. It being necessary, in order to make out the 600 pages, to include in this volume some of the opinions delivered at the *November* term, 1855, it has been thought best, on account of the interest felt in the questions involved in the case of *Beebe v. The State*, to include the opinions delivered in that case in this volume.

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is alleged to be the prohibitory portion of said liquor act; and that question will, therefore, without inquiry upon the point, be considered. We approach it with all the caution and solicitude its nature is calculated to inspire, and that intention of careful investigation its importance demands, feeling that the consequences of the principles we are about to assert, will not be confined in their operation to this case alone.

Preliminary to the discussion of the main questions involved, however, the course of argument of counsel requires that we should say a word by way of fairly setting forth the duty this Court has to perform in the premises, viz., the simply declaring the constitutionality or unconstitutionality of the law, with an assignment of the reasons upon which the declaration is based.

It will not be for us to inquire whether it be a good or a bad law, in the abstract, unless the fact, as it might turn out to be, should become of some consequence in determining a doubtful point on the main question. It not unfrequently becomes the duty of Courts to enforce injudicious acts of the legislature because they are constitutional, and to strike down such as, at first view, appear to be judicious, because in conflict with the constitution.

With these remarks, we proceed to the examination of the feature of the liquor act of 1855 now more especially presented to the Court. We shall not spend time upon the inquiry, whether, on the day it came into force, there were existing unsold, manufactured products in the hands of the distillers and brewers upon which it operated, rendering them valueless, or whether such products had all been disposed of between the passage and taking effect of the law. We shall direct our investigation to the character of its operation upon the future manufacture, sale, and consumption of intoxicating liquors. And,

1. Is it prohibitory?

The first section enacts, "that no person shall manufacture, keep for sale, or sell," any "ale, porter, malt beer, lager beer, cider," wine, &c.

The second section permits the manufacture and sale of

cider and wine, under certain restrictions, by any and all of the citizens of the state.

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Other sections permit the manufacture of whiskey, ale, &c., by persons licensed for the purpose, so far as may be necessary to supply whatever demand certain persons called county agents may make upon them. These agents are authorized to sell for medicinal, mechanical, chemical and sacramental uses, and no other, and may procure their liquors of the licensed manufacturers, but are not required to do so, and as matter of fact do not, but obtain them in most cases from abroad. They constitute no part of the people engaged in business on their own account, but are appointed, under the law, by the county commissioners; supplied with funds from the county treasury; paid a compensation for their services by the county; sell at prices fixed for them; and make the profits and losses of the business for the public treasury and not for themselves. We say they are furnished with public funds. They are so in all cases; for where they, in the first instance, invest their own, it is by way of loan to the county at a fixed rate of interest, and the amount is refunded by the county with interest. These selling agents then are, and for convenience may be denominated, government agents; for it is all one in principle whether the government creates and furnishes them with funds through the medium of the counties, or appoints them directly by statute and supplies them with funds from the state treasury. To express, then, the substance of the main provisions of the law, they may be paraphrased thus:

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1. Be it enacted, that the trade and business of manufacturing whiskey, ale, porter and beer, now and heretofore carried on in this state, shall cease; except that any person specially licensed to manufacture for medicine, &c., for the government, may do so, and sell to that extent, if the government should conclude to buy of such person, but not otherwise.

2. That no person in this state shall sell any whiskey, beer, ale or porter, unless the sale be to an agent of the government, or by such agent for medicine, &c. And, as

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no person is allowed to provide himself with those articles by manufacture or purchase, to use as a beverage, it results,

3. That no person in this state shall drink any whiskey, beer, ale or porter, as a beverage, and in no instance except as a medicine.

It thus appears that the law absolutely forbids the people of the state to manufacture and sell whiskey, ale, porter and beer for use as a beverage, or at all, except for the government, to be sold by it for medicine, &c.; and it prohibits absolutely the use of those articles by the people as a beverage.

The exception as to the admission of foreign liquors under the constitution and laws of the *United States*, will not be noticed, for the reason that they are admitted simply because it is conceded that they can not be prohibited, and not in accordance with the spirit and policy of the state statute; and which foreign liquors may, or may not, be obtained here, according to the contingent action of other powers; and for the further reason, that their admission, if claimed to be a part of the object and policy of the state liquor law, or in order to supply the people with liquor as a beverage, renders the law doubly objectionable, for, while, according to such a view, the law designs to permit the use of liquors as a beverage, it prohibits the people from manufacturing for their own use. It is as if the law were that the people might eat bread, but should not raise the grain and grind it in flour wherewith to make it. It would be an act to prohibit the people from themselves producing, and to compel them to purchase from abroad what they might need to eat and drink. It would involve the principle of an act to annihilate the state, by starving the people constituting it to death; and such legislation would hardly comport, we think, with a constitution established to promote the welfare and prosperity of the people. We assume it as established, then, that the liquor act in question is absolutely prohibitory of the manufacture, sale and use, as a beverage, by the people of this state, of whiskey, ale, porter and beer.

The opinion has, indeed, been advanced, that the manufacture for sale out of the state is not prohibited, but it has not the substance of a shadow; and the morality of that law which prohibits the distribution of pauperism and crime, disease and death, at home, but permits them to be scattered amongst our neighbors, is not to be envied.

(And we may as well remark here as anywhere, that if the manufacture and sale of these articles are proper to be carried on in the state for any purpose, it is not competent for the government to take the business from the people and monopolize it. The government can not turn druggist and become the sole dealer in medicines in the state; and why? Because the business was, at and before the organization of the government, and is properly at all times, a private pursuit of the people, as much so as the manufacture and sale of brooms, tobacco, clothes, and the dealing in tea, coffee and rice, and the raising of potatoes; and the government was organized to protect the people in such pursuits from the depredations of powerful and lawless individuals, the barons of the middle ages, whom they were too weak to resist, single-handed, by force; and for the government now to seize upon those pursuits is subversive of the very object for which it was created, and is inconsistent with the right of private property in, and pursuits by, the citizen. "A government is guilty of an invasion upon the faculties of industry possessed by individuals, when it appropriates to itself a particular branch of industry, the business of exchange and brokerage for example; or when it sells the exclusive privilege of conducting it." *Say's Political Economy*, note to p. 134.

There are undertakings of a public character, such as the making of public highways, providing a uniform currency, &c., that a single individual has not power to accomplish, and which government must therefore prosecute; but they are not the ordinary pursuits of the private citizen. These, certainly, as the general rule, and we are not now prepared to name an exception, the government can not engage in. This is all we shall here say upon

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Nov. Term, this point. Time and space forbid that we should elaborate all that arise in the case.]
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 THE STATE. The question now presents itself,
 2. Could the legislature of this state enact the prohibi-
 tory liquor law under consideration?

Few, if any, judicial decisions will be found to aid us in investigating this question, as no such law, in a country possessed of a judiciary and a constitution limiting the legislative power, has, till of late, been enacted. Hence, it has not often, if at all, as to this point, passed under judicial consideration.

A number of *European* writers on natural, public, and civil law, are cited by counsel on behalf of the state, to show the extent of legislative power; but those writers, respectable, able, and instructive upon some subjects as they are admitted to be, are not authority here upon this point. They are dangerous, indeed utterly blind guides to follow in searching for the landmarks of legislative power in our free and limited government; for they had in view, when writing, governments as existing when and where they wrote, under which they lived and had been educated, and which had no written constitution limiting their powers; governments, the theory of which was, that they were paternal in character; that all power was in them by divine right, and they, hence, absolute; that the people of a country had no rights except what the government of that country graciously saw fit to confer upon them; and that it was its duty, like as a father towards his children, to command whatever it deemed expedient for the public good, without first, in any manner, consulting that public, or recognizing in its members any individual rights.

Indeed the discovery of the great doctrine of rights in the people as against the government, had not been made, when the writers above referred to lived.

Such governments as those described could adopt the maxim quoted by counsel, that the safety of the people is the supreme law, and act upon it; and being severally the

sole judges of what their safety in the countries governed respectively required, could prescribe what the people should eat and drink, what political, moral and religious creeds they should believe in, and punish heresy by burning at the stake, all for the public good. Even in *Great Britain*, esteemed to have the most liberal constitution on the *Eastern* continent, *Magna Charta* is not of sufficient potency to restrain the action of parliament, as their judiciary does not, as a settled rule, bring laws to the test of its provisions. Laws are there overthrown only occasionally by judicial construction. Such a thing, indeed, as deciding a law or royal decree unconstitutional, in an absolute government is unknown. Hence the oppression of the people.

And it must be admitted that efforts have not been wanting to engraft upon the governments of this country something of the same principle. It is, in fact, the "general welfare" doctrine, under which it was claimed by latitudinarians that the congress of the *United States* could enact alien and sedition laws, national banks, &c., for the public good. It is the same principle upon which some of the states enacted laws compelling men to attend, on *Sunday*, a *Protestant* church, and pay to support it. The proposition was laid down in them in regard to religion, as by counsel for the state here in regard to prohibition, that it was for the public morals, and good of families, and prevention of crime, that men should observe the ordinances of the gospel, and occupy seats in *Protestant* churches, instead of other places, on the sabbath; and, hence, the state compelled them by law to do so. But the doctrine has been fraught with oppression, and has not produced, permanently, promised results. Limitations have been inserted in constitutions upon the legislative power to prevent this oppression. And over the people of this state hangs the shield of written constitutions, which are the supreme law, which our legislators are sworn to support, which grant a restricted legislative power, within which the legislators must limit their action for the public welfare, and whose barriers they can not overleap under

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any pretext of supposed safety of the people; for along with our written constitutions we have a judiciary, created by them a co-ordinate department of the government, whose duty it is, as the appropriate means of securing to the people safety from legislative aggression, to annul all legislative action without the pale of those instruments. This duty of the judicial department, in this country, was demonstrated by chief justice *Marshall*, in *Marbury v. Madison*, 1 Cranch 137, and has since been recognized as settled *American* law. Indeed it is a great distinguishing feature of a limited government.

The maxim above quoted, therefore, as applied to legislative power, is here without meaning.

Nor does it prove the power of the state legislature to enact the law in question, to show that the Supreme Court of the *United States* has decided that it can not declare such a state law inoperative, for that Court can only declare void such state laws as conflict with the restrictions imposed upon state power by the constitution of the *United States*; and if, in that constitution, the states are not restrained from passing laws in violation of the natural rights of the citizen, the Supreme Court of the *United States* can not act upon such laws when passed, because they do not fall within its jurisdiction. But it does not follow that because the constitution of the *United States* does not prohibit state legislation infringing the natural rights of the citizen, such legislation is valid. The constitution of the *United States* may not, but that of the state may inhibit it.

And so, indeed, according to many eminent judges, may principles of natural justice, independently of all constitutional restraint. This doctrine has been asserted here. In *Andrews v. Russell*, 7 Blackf. 474, judge *Dewey* says: "We have said that the only provisions in the federal or state constitution, restrictive of the power of the legislature," &c., "are," &c. "There are certain absolute rights, and the right of property is among them, which, in all free governments, must of necessity be protected from legislative interference, irrespective of constitutional checks and

guards." Should we find, however, in the course of this investigation, that the constitution of our free states does in fact sufficiently protect natural rights from legislative interference, as it surely does, or it is grievously defective, it will not become necessary for us to inquire whether, in any event, it might be proper to fall back upon the doctrine above so unhesitatingly asserted.

But before proceeding further, it is proper we should say, that eminent judges of the Supreme Court of the *United States* have asserted that a state, so far as not restrained by the constitution of the *United States*, has the same "unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation;" *New-York v. Miln*, 11 Peters 102; *License Cases*, 5 How. 504; and that we admit the doctrine for the purposes of this case, in the application which they gave it, viz., that the state, in its sovereign capacity, possesses this power; not that the legislature, under our state constitution, possesses it. The doctrine asserted is, that the state, in its sovereign capacity, possesses such power, which, by a constitution, she is capable of conferring, if she pleases, upon her legislature; not that she has conferred it. No judge of the Supreme Court of the *United States*, in the cases cited, assumed to analyze the constitution of this state, and say that it conferred upon, or left with, the legislature, the unlimited powers of a despotism, or what power it did grant or withhold.

We admit further, at this point, that it has also been declared, that the taxing power of a state is unlimited, and, hence, may be exercised in such a manner as practically to prohibit particular pursuits upon which it may be made too heavily to fall; for example, the selling of dry goods or liquors. But an enactment of such description has none of the features of a formal prohibitory law, for it is based upon the assumption that the taxed pursuit is to exist and not cease; its continuance is, indeed, invited by the act, as its cessation would defeat the very object of the enactment, being revenue; and prohibition, if it resulted, would not be found in the law, but in the accident

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that nobody happened to be able, or to feel disposed at the time, to pay the tax for the sake of the business. This would be accidental, and might be temporary.

The question then recurs, the one now to be decided—
(Does our constitution prohibit the passage of such an act as that involved in the present suit?

That instrument contains a grant of legislative power, and it contains express limitations upon that grant. There are also, probably, implied limitations. But if the present case can be decided upon the express limitations, it will not be necessary for us to discuss the questions of the extent of power conferred upon the legislature by the general grant, and of implied limitations.

We proceed to examine the express limitations. The first section of the first article declares, that "all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." Under our constitution, then, we all have some rights that have not been surrendered, which are consequently reserved, and which government can not deprive us of unless we shall first forfeit them by our crimes; and to secure to us the enjoyment of those rights is the great aim and end of the constitution itself.

It thus appears conceded that rights existed anterior to the constitution; that we did not derive them from it, but established it to secure to us the enjoyment of them. And it here becomes important to ascertain with some degree of precision what these reserved natural rights are. To do this we must have recourse to the common law, as the section was undoubtedly inserted in the constitution with reference to it. Counsel, in the argument of this cause, on the part of the state, it is true, deny the existence of any such rights in *Indiana*. Our answer is, the constitution above quoted has settled the point here; and a legislature, acting under that instrument, is estopped by its solemn declaration to deny the existence of the natural rights there asserted. That assertion, while it remains, is binding within the territory of *Indiana*. When the people of the state shall become satisfied that it is founded in

mistake, they can meet in their sovereign capacity, strike it from their organic law, and insert the contrary, that they are without natural rights, and at the mercy of the legislature. We may properly here observe, that added to these restrictive provisions of the bill of rights, in the old constitution, was the following:

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"SEC. 24. To guard against any encroachment on the rights herein retained, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate."

The new constitution does not contain this section; but that constitution did not intend to weaken the restraints designed for the protection of the people, and the section quoted was omitted because the expressly declared reservations in the bill of rights were necessarily taken from the absolute power of the legislature without such declaratory section. And it should be here remarked, that it is not said these rights are reserved to be used without restraint. Each individual being equally entitled to their exercise, the right of each operates as a check upon the right of every other, compelling mutual regard for those of each, and subjecting each to punishment by the judiciary, under legislative regulations, for violating the equal right of every other, and giving the injured in all cases redress by law. And further provisions of the constitution, which must be construed together with that quoted, confer powers, such as taxation, &c., on the legislature relative to these rights. Such powers may be exercised.

We proceed, then, to inquire what these reserved rights are; and to ascertain, we go, as we have said, to the common law. Chancellor *Kent*, following *Blackstone*, says, vol. 2, p. 1, "The absolute [or natural] rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property;" not some property, or one kind of property, but, at least, what the society organizing government recognizes as property. How much does this right embrace? How far does it extend? It undoubtedly extends to the right of pursuing the trades of manufacturing,

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buying and selling, and to the practice of using. These acts are but means of acquiring and enjoying, and are absolutely necessary and incidental to them. What, we may ask, is the right of property worth, stripped of the right of producing and using?

The right of property is equally invaded by obstructing the free employment of the means of production as by violently depriving the proprietor of the product of his land. *Say's Political Economy*, 133.

In *Arrowsmith v. Burlingim*, 4 McLean 497, it is said: "A freeman may buy and sell at his pleasure. This right is not of society, but from *nature*. He never gave it up. It would be amusing to see a man hunting through our law books for authority to buy or sell or make a bargain." To the same effect, Lord *Coke*, in 2 Inst., c. 29, p. 47.—*Rutherford's Institutes*, p. 20.

So far, then, we find that the people have expressly reserved the right of property, and its enjoyment, in forming their constitution, from the unlimited power of the legislature; and further to guard the right, have ordained that it shall not be taken from them without just compensation, nor be injured without a remedy therefor by due course of law, that is, a legal trial in Court, nor be subject to unreasonable seizure, &c. Sec. 11, art. 1, and ss. 12 and 21 of the same article. They have, however, as we have said, authorized the legislature, by art. 10, sec. 1, to tax, by a "uniform and equal rate," the property of the people of the state, and impliedly, as we have seen, to take it, by paying for it, for the public use. Now these restraints upon the legislative power were inserted in the constitution for some purpose; what was it? And they have some meaning; what is it? Wherein do they furnish security to the citizen? This Court must determine. Their object was, beyond all question, to protect the people from aggression on the part of the government; and under them the legislature can not take the property, the liquors of a single individual, if they are property, when not needed for public purposes, and then only upon compensation. But if the legislature can not deprive a single citizen of

his property, can it, by a general law, deprive all the citizens of theirs? If that body could not enact that *A. B.* should no longer cultivate his farm, could it by a general law enact that all the farmers of the state should cease to cultivate theirs? Further, these restrictions in the constitution apply alike to all property; they make no distinction. Is liquor, then, property? Is a distillery property? They are so, unquestionably, in *Indiana*. At the time of the adoption of our present constitution, there were fifty distilleries and breweries in the state, which turned out annually manufactured products to the value of half a million of dollars, used mostly by our people as a beverage. Liquor had always been an article of use and traffic in the state, and always been taxed as property. With these facts existing, the subject was repeatedly brought before the constitutional convention, and that body refused to make any change in the relation of the government towards this species of articles. We are safe in saying, then, that under this constitution, the government could not take, for public use, from a single individual, a single barrel of liquor without paying for it. Can it, then, by a general law, annihilate the entire property in liquors in the state?

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There are other provisions of the constitution that have some bearing upon this point, as evincing regard by that instrument for individual property and the right of traffic. Sec. 22, of art. 1, declares that—

“The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted.”

Now suppose the property of a debtor to consist, as the fact might be, entirely of liquor. Of what avail is this constitutional provision, if the government can step in at will and confiscate that property?

Again, section 24, of the same article, provides that no law shall ever be passed impairing the obligation of a contract. Yet here is a law, which, by prohibiting an entire

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pursuit and rendering valueless all the property involved in it, must, of necessity almost, impair all executory contracts that have grown out of that pursuit, and render them utterly incapable of fulfilment.

The position, however, is taken, on the part of the state, that it is competent for the legislature, whenever it shall deem proper, to declare the existence of any property and pursuit deemed injurious to the public, *nuisances*, and to destroy and prohibit them as such; and that such action of the legislature is not subject to be reviewed by the Courts. We deny this position. We deny that the legislature can enlarge its power over property or pursuits by declaring them nuisances, or by enacting a definition of a nuisance that will cover them. Whatever it has a right by the constitution to prohibit or confiscate, it may thus deal with, without first declaring the matter a nuisance; and whatever it has not a right by the constitution to prohibit and confiscate, it can not thus deal with, even though it first declare it a nuisance. It can not do by indirection what it can not do directly. For example, the constitution of the *United States* prohibited the abolition by congress of the foreign slave trade till 1808. Const. *U. S.*, art. 1, s. 9. Now, prior to that date, congress could not have, by direct enactment, prohibited the slave trade, for want of power. Could she, then, have declared the trade a nuisance, and then abolished the nuisance? Had she the power to do that?

Again, art. 1, sec. 9, of the constitution of *Indiana*, declares that—

“No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible.”

Under this provision, all will admit that if the legislature of this state should assume that the press had become so licentious as to require its suppression, and should enact a law accordingly, that law would be void, and this Court bound to pronounce it so. But could the legislature evade the constitutional provision, by first declaring

the press throughout the state a nuisance, and then enacting that it should cease to exist? It surely could not, or the constitutional provision is worthless.

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Now, as the legislature can not declare the press and printing business nuisances, because protected by the constitution, so it can not declare property and the acquisition and use of it, nuisances, for precisely the same reason.

But the section above quoted of the constitution itself, points out the remedy for the evil of abuse. And it indicates the general remedy in all these cases. It is the responsibility, that is, the liability to suit and punishment, and loss, by forfeiture, of the particular press made the instrument of abuse, of "every person" who shall be guilty of committing such evil. And the questions of the guilt of the individual and abuse of the property, in every case, are to be decided by the judiciary, and the punishment inflicted by that department. Any other mode of adjudging guilt and inflicting punishment, is but mob or lynch law.

But to return. The questions whether a law is in conflict with the constitution or not, and whether a thing is a nuisance or not, and, hence, liable to forfeiture, are judicial, and to be finally determined by the Courts alone. Such is the organic law of the state, and it is, hence, needless to discuss its propriety here. See *Doe v. Douglass*, 8 Blackf. 10. Why it has been so ordained in the constitution, whether because of the supposed superior capacity of the judicial department to judge of such questions, or for other reasons, it is not particularly important to inquire. We may, in this connection, however, quote with propriety from *Young v. The State Bank*, 4 Ind. R. 301, as follows: "Now, the constitution [article 3 of that of 1851] above quoted, says, the legislature shall not perform a judicial act. The granting of a new trial [in a suit in Court] we have seen, is a judicial act. Therefore, the legislature can not grant a new trial. And it is a power that should not be possessed by the legislature in its legislative capacity; because, in that capacity, it would not be governed in its action by legal rules. And to permit it to dispose of judi-

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cial questions in that capacity, would be in the highest degree dangerous to the rights of the individual members of the community."

It is, indeed, most strenuously contended, in this case, by counsel, that the propriety and validity of the liquor act under consideration, were questions to be determined by the discretion of the legislature, and that the determination of that body is not subject to review in this tribunal; and some early cases in the Supreme Court of the *United States*, particularly *McCullough v. The State of Maryland*, 4 Wheaton R. 316, are cited as sustaining the doctrine. We shall enter into no argument upon the theory or first principles of the question. We shall treat it as one of authority. Indeed, in the case in *Wheaton, supra*, the distinguished chief justice, in the opening of his opinion, uses language that might justify a review of the law before us by this Court. He says that "a doubtful question, in which the great principles of liberty are not concerned," might perhaps be put to rest by the repeated action of the legislature; implying, certainly, that had the question in that case been one that was conceived to concern those great principles, it might have been decided by a different rule. Such is the question now before this Court for decision. It does concern the great principles of liberty. It is to determine whether one single dollar's worth of property in this state, and the right to pursue a single employment; whether, indeed, a single *iota* of personal liberty remains to the people, secure from the invasion of a despotic legislature—for if it can strike down one of the recognized pursuits of the citizens, it can all. But whatever may be the rule asserted in the early cases, that of *Bronson v. Kinzie*, 1 Howard (U. S.) R. 311, so late as 1843, determines, beyond all doubt, that the Courts will review and decide upon the exercise of legislative discretion, so far as to determine whether, in the given case, the constitution has been violated. It involved and decided precisely the question so earnestly argued in this case, and which we are now considering. In that case, the legislature of *Illinois* enacted a law regulating the replevy of

judgments and the sale of property on execution. There was no provision in the constitution expressly prohibiting legislation upon legal remedies, and hence it was claimed that, under the general grant of legislative power, the right to so legislate passed to the legislature in its discretion. But the constitution of the *United States* did forbid the passage of a law impairing the obligation of a contract; and the Supreme Court decided that they would look into the manner in which the legislature had exercised its discretion in a matter where there was no express restriction, to see that it had not, in that exercise, violated some express constitutional provision. Judge *McLean* dissented, contending for the right of legislative discretion; but the same Court, in subsequent cases, reaffirmed the doctrine of *Bronson v. Kinzie*, and it is now the settled law. *McCracken v. Hayward*, 2 How. (U. S.) R. 608.—*Gantly's Lessee v. Ewing*, 3 *id.* 707.—*Curran v. Arkansas*, 15 *id.* 304. This Court unanimously adopted the same rule in *Thomas v. The Board of Commissioners of Clay County*, 5 Ind. R. 4, and in *Maize v. The State*, 4 *id.* 342. And can it be that legislative discretion shall be controlled in the matter of violating a contract, and not where it annihilates a great pursuit involving millions of dollars and innumerable contracts?

Another position is taken by counsel who last argued this cause for the state, and insisted upon with great confidence. It is this: that the legislature has unlimited power over the commerce of the state, and can, hence, prohibit altogether the sale of liquors, or direct the sole purposes for which they may be sold. It is argued in this way. Congress has power to regulate foreign commerce, commerce between the states and with the *Indian* tribes; and under this power she may prohibit all commerce, in the named cases, confiscate property, &c. The legislature of the state has power, under the general grant, to regulate domestic commerce; hence, like congress, it may prohibit, confiscate, &c.

The cases are not parallel and the reasoning is unsound. The grant to congress of power to regulate commerce, is,

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since 1808, unlimited. There is no bill of rights in the constitution of the *United States*; in short, no restriction, unless by implication, upon the power of congress to regulate trade, in the specified instances. Hence, congress, do what she may, can not be shown, on this subject, to have violated any restriction in the federal constitution under which that body acts, because it contains none.

Now how is it with the legislature and constitution of this state? Our state constitution contains, as we have seen, certain restrictions upon the legislative power, certain sections declaring rights in the citizen as against the government, and these restrictions operate just as potently upon the power of the legislature to regulate commerce as to do anything else—prevent that body just as effectually from infringing the reserved rights by assumed regulations of commerce as by any direct enactment. To illustrate. The constitution declares that every citizen shall be secure in the right to worship *God* according to the dictates of his own conscience. Now the great body of religious denominations in this state, conscientiously believe they are bound to celebrate one of the ordinances of the gospel by the use of bread and wine. But wine is an article of commerce, and its purchase is a commercial transaction. Therefore, upon the argument, the legislature has power to prohibit its use, or declare the purposes for which it may be sold and purchased. It may, therefore, declare that it shall not be sold or purchased for sacramental use, thus, in effect, overthrowing the constitutional provision, that the citizen shall have the right to worship according to his conscience, and abolishing the general practice of the christian ordinances in the state. This the legislature can not do. It must regulate within the restrictions of the constitution. So the purchase of nails and lumber is commerce. Can the legislature say, they may be purchased to build barns with, but not churches or dwellings?

Again, the constitution says, as we have quoted above, that the right of printing—the freedom of the press—shall remain inviolate in this state. But the purchase of paper to print on, ink to print with, and type, is commerce.

And can the legislature prohibit, or declare the uses for which such articles may be purchased, saying, they may be purchased for the purpose of printing advertising handbills, but not to print books or newspapers? Surely such a law would as effectually violate the constitution, as a direct enactment that no books or newspapers should be printed in the state.

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We might continue these illustrations, but it can not be necessary.

The legislature has no more right to violate the constitution, under the guise of a regulation of commerce, than by a statute literally in conflict with it. And if, as in the above-instanced cases, the express provisions of the constitution secure to the citizen his property and its reasonable use, the legislature can not take away the right by any legerdemain of legislation. And whenever the legislature does so invade the constitutional right of the citizens, they are not bound to submit to the outrage for two years, till the assembling of another legislature, nor to resort to the terrible remedy of revolution, but may quietly and peacefully invoke the action of the judiciary to annul the act of legislative usurpation.

And here we are called upon to mark the line which bounds the power of the legislature on the one hand and the right of the citizen on the other; to say what the legislature may and may not do in all cases. We answer that we have already pointed out the line, so far as to show that in this case the legislature has overstepped it and invaded the constitutional right of the citizen. This is all we can now be required to do. The judicial mind must place each case, as it arises, upon the proper side of the boundary admitted to exist. This will be its duty and no more. Such has been the practice.

We have said that we should treat the question of the right of the Court to judge of the grounds of a law alleged to infringe constitutional restrictions, as one of authority. We will however add the remark, that the Court knows, as matter of general knowledge, and is capable of judicially asserting the fact, that the use of beer, &c.,

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What harm, we ask, does the mere manufacture or sale or temperate use of beer do to any one? and the manufacturer or seller does not necessarily know what use is to be made by the purchaser of the article. It may be a proper one. And if an improper one, it is not the fault of the manufacturer or seller, but it is thus appropriated by the voluntary act of another person, and by his own wrong. And will the general principle be asserted, that to prevent the abuse of useful things, government shall assume the dispensation of them to all the citizens—put all under guardianship? Fire-arms and gunpowder are not manufactured and sold to shoot innocent persons with, but are often so misapplied. Axes are not made and sold to break heads with, but are often used for that purpose in the hands of murderers. Bread is not made to make gluttons with, but is perverted to that use. Razors are not made to cut throats with, but are applied in that way by the suicide. The *Almighty* did not create fists to knock people down with, but they are often put to that use, and still he permits men to be born with fists. Yet who, for all this, has ever contended that the manufacture and sale of these articles should be prohibited as being nuisances, or be monopolized by the government? We repeat, the manufacture and sale and use of liquors are not necessarily hurtful, and this the Court has a right to judicially inquire into and act upon in deciding upon the validity of the law in question—in deciding, as was done in *Bronson v. Kinzie*, *supra*, whether it is an indirect invasion of

a right secured to the citizen by the constitution. This question the Court must decide; and it must, therefore, in some manner, satisfy its judgment and conscience upon it. 5 Hill (N. Y.) R. 121, and cases cited.

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The act is not one to prohibit or punish drunkenness, or any abuse of the use of liquors. Were it, a different question might be presented—one, however, on which we here intimate no opinion, as it is not before us. When a case shall arise calling for a decision as to the extent of the power of the legislature to regulate, without prohibiting, we shall be prepared to make that decision according to the best of our judgment.

The restrictions which we have examined upon the legislative power of the state, were inserted in the constitution to protect the minority from the oppression of the majority, and all from the usurpation of the legislature, the members of which, under our plurality system of elections, may be returned by a minority of the people. They should, therefore, be faithfully maintained. They are the main safeguards to the persons and property of the state. They will be maintained, in so far as depends upon us, notwithstanding the intimation at the argument, that whoever interposed an obstruction to the free course of this law, was to be swept away by an overwhelming torrent. We shall be deterred by no such ill-timed threat from what we believe to be the discharge of a solemn duty.

It is easy to see that when the people are smarting under losses from depreciated bank paper, a feeling might be aroused, that would, under our plurality system, return a majority to the legislature which would declare all banks a nuisance, confiscate their paper and the buildings from which it issued. So with railroads, when repeated wholesale murders are perpetrated by some of them. And in *Great Britain* and *France*, we have examples of the confiscation of the property of the churches even, which here the same constitution that protects the dealer in beer, would render safe from invasion by the legislative power.

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In our opinion, for the reasons above given, the liquor act of 1855 is void. We express no opinion upon any single provision of the act, as in the view we have taken of its general scope, it is unnecessary.

DAVISON, J.—I concur in the foregoing opinion of Judge PERKINS.

STUART, J.—*Beebe* was prosecuted before the mayor of *Indianapolis*, for two distinct violations of the liquor law of 1855. The one was a charge for manufacturing beer, the other for selling it contrary to the provisions of that act. He was tried, convicted in both cases, and fined 50 dollars in each. Failing to pay or replevy the fines, *Beebe* was committed to prison. On his application to the judge of Common Pleas, a writ of *habeas corpus* was issued. The officer having him in charge returned, as the cause of detention, the proceedings, judgment and order of the mayor in the cases referred to. After hearing he was remanded to prison. From that order he appeals.

These cases have been twice argued orally, with distinguished ability on both sides. And what is still more commendable, the argument was conducted with that moderation and forbearance so becoming in forensic discussion.

The first inquiry is, what does the record present? Simply a question of legislative power. The details of the law are not before us, and are not, of course, considered.

The inquiry here is confined to the *sale*; for the question arising on the other case for manufacture, admits of a very different solution. Having for reasons given in that case, come to the conclusion that the agency feature, and the several parts of the law relating to manufacture, were unconstitutional, the question on the sale arising on the other *Beebe* record alone remains.

The act assumes to confine the use of liquor to the departments of science and the ordinances of christianity.

And the question is, was it competent for the legislature thus to restrain the sale and use of intoxicating liquor? Nov. Term,
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It is admitted in argument that there is no express provision of the constitution restricting the general assembly on that subject. BEEBE
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But it is insisted that such restriction is implied in the first section of the bill of rights. Let us place the statute and that section of the constitution together.

Stripped of all that relates to the agency and the manufacture, the first and fifth sections, as to sale, are, in substance, that no person shall keep for sale or sell, by himself or agent, directly or indirectly, any spirituous or intoxicating liquor, except for medicinal, chemical or mechanical uses only, and pure wine for sacramental use. Laws of 1855, pp. 209, 211.

To prevent misconception, the first section of the bill of rights is quoted entire :

"SEC. 1. We declare, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government."

According to all publicists, the right to hold and enjoy private property is among the unalienable rights. In the constitution of 1816, the right "of acquiring, possessing and protecting property," was expressly enumerated.

It becomes important, therefore, to inquire, in what sense are the rights of life, liberty and property said to be unalienable? It does not mean that the legislature shall not pass any law in relation to them. For the whole statute book is, in some measure, a standing interference with, and regulation of, these very things. The executive, the warden of the prison, the sheriff, the whole corps of executive and administrative officers, are continually taking away those rights from some citizen.

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It does not mean, therefore, that those rights are to be held superior to and above the laws. They are held subordinate to such municipal laws and police regulations as the political organization in which those rights are enjoyed may rightfully enact under the constitution. They are held subject to such restraints as "the peace, safety and well-being" of the body politic may require. Thus in *Calder v. Bull*, 3 Dallas 386, the Supreme Court of the *United States* say, "The right of property is always subject to the rules prescribed by positive law. The right vested in the citizen is, to do certain acts, or possess certain things, according to the law of the land."

These rights, therefore, may be taken away in "due course of law," as the forfeit of violating municipal enactments.

What, then, does the unalienable right of property mean? It might be comprehensively answered, that the whole constitution is a comment on that text. It means that the citizen shall be secure in his effects from unreasonable search and seizure; s. 11, art. 1; that he shall have a right to a public trial by jury; ss. 13 and 20, *id.*; that his services or property shall not be taken without just compensation; s. 21, *id.*; and so of all the other restrictions of the constitution. "They are the barriers erected by the people" against the encroachments of the powers they have delegated to their public servants.

Locke says, it is against natural right for the government to "dispose of the estates of subjects arbitrarily, or divest vested rights at pleasure." The legislature can not take the property of *A.* and give it to *B.* So, in the school cases, it was said by this Court, that the legislature could not take the property of *A.* and *B.*, divert it from their use, and distribute it ratably to third persons. The unsoundness of such legislation, as violating fundamental principles, could not be doubted. 6 Ind. 83.

So also in *Wilkinson v. Leland*, 2 Peters 627. The property of heirs had been illegally sold, and the legislature of *Rhode Island* passed an act confirming the sale. It was in reference to this invasion of private property, that

judge *Story* delivered the eloquent passage to be found in 2 Peters 657. He justly declares, "that government can scarcely be free where the estate of the citizen can be transferred without trial, without notice, and without offence."

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So in *Doe v. Douglass*, 8 Blackf. 10, judge *Perkins*, speaking of a similar state of facts, says, "The legislature is supreme, except wherein restrictions have been imposed." He adds, "the restrictions of the constitution restrain the legislature from passing a law impairing the obligation of contracts, from the performance of a judicial act, and from any flagrant violation of the right of private property." Here the remarks must be taken with reference to the facts of the case. Judge *Perkins* was not speaking of a municipal law made to protect all. He had reference to an act of the assembly confirming the illegal sale of three lots in *Evansville*.

So in the celebrated case of *Fletcher v. Peck*, 6 Cranch 87. The question arose on an act of the legislature of *Georgia*, alleged to have been passed corruptly, authorizing the issue of a patent. *Marshall*, C. J., guardedly says: "To the legislature all legislative power is granted. But whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection." Here, also, the venerable judge was speaking, not of a municipal law or police regulation to promote the peace, safety and well-being of the people of *Georgia*. He had reference to a law operating directly on specified property of a citizen of that state.

It is in these cases, and in such a state of facts, that the *dicta* about unalienable rights, so often quoted by elementary writers, occur. These cases sufficiently indicate the meaning of "unalienable rights," as used in the first section of the constitution. They sufficiently distinguish between an act which assumes to transfer private property without trial, without notice, and without offence, from an act of municipal regulation having for its object the peace, safety and well-being of society. The application of this

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distinction is obvious. Suppose the legislature of *Indiana* had passed an act appropriating fifty barrels of the appellant's beer to the use of the mayor of *Indianapolis*. This would have been an infringement of *Beebe's* "unalienable rights." Against such spoliation of his property, without offence, trial, or notice, the Courts would be bound to afford him prompt protection. But not against the operation of a municipal law enacted in conformity to the constitution.

Closely connected in the argument with unalienable rights, are the limitations of legislative power outside of the constitution. The relevancy of the inquiry is not readily appreciated. It involves many curious questions lying all along the exterior boundary of the rights and duties of rulers and people in extreme cases. It will be pardonable to decline speculation. Extreme cases seldom prove anything satisfactorily. We will therefore confine ourselves to the facts as we find them in the constitution and law, and our judicial duty in the premises.

The tendency of Courts is, or at least should be, anything but revolutionary. What rights and what legislative checks outside of the constitution, and not delegated by the people to their public servants, may exist, we are not careful to inquire. They can seldom, if ever, become a basis or rule of decision. Perhaps these inquiries might not be out of place in a popular assembly. But at this late day, in a government like ours, with distributive and well-defined powers and duties, the settlement of those abstruse questions does not seem to be the chief debt we owe the public.

It is enough for us to know, that whatever these extreme rights are, their protection does not fall exclusively within our jurisdiction. With the rights themselves the people have also prudently retained in their own hands the means of redress. They are ever ready to vindicate them at the ballot-box or by revolution, as the case may require. Among our people revolution has attained perfection. The evils or errors which afflict the body politic are intelligently investigated and traced to their source.

The remedy is simple and effectual. A constitutional convention of eminent citizens is the substitute for the armed mob of other countries. If the powers hitherto delegated are too great consistently with the private rights of the citizen, they are quietly abridged. If insufficient to afford protection, they are enlarged and moulded to meet the circumstances. So that revolution should begin with the people, and not with the Courts. Any other revolution can not readily be distinguished from subversion.

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The system we have adopted is marked for simplicity. The judiciary, and all the other departments, live and move and have their official being and sphere of action in the constitution. Art. 3, s. 1. The duty of the Courts is chiefly expository. When the constitution and laws come up for adjudication, both must be regarded as the work of the same hands. Both are of the people. Both must be respected unless they conflict. 4 Ind. 342, and the authorities there cited. In case of conflict, the temporary will contained in the law, must yield to the paramount will contained in the constitution.

For the Courts to declare a law void on any other ground—to set it aside because it is impolitic or inexpedient, or even, like the liquor law, odious and oppressive in some of its features, looks like assuming to protect the people against themselves.

It is easy to imagine that the legislature may pass a very odious enactment. Our statute books abound with them. Such were both the bankrupt laws passed by congress. Interest or passion, or perhaps other dubious influences, often mould legislation. The advocates of ultra measures have the popular ear one year. A law is passed in accordance with their views. Next year those who suffer from the new policy appeal successfully to the same public. The reason is on the surface. Any enactment in advance of a sound and matured public opinion, or based upon the fluctuating fever of the hour, or odious in itself under any healthy state of the public mind, is sure to be swept from the statute book before it is dry.

But it does not thence follow that the *Courts* must

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The people remedied this evil by amending the constitution. Sec. 1, art. 10.

All the Courts can do with odious statutes which are constitutional, is, to chasten their harshness by construction. Such is the imperfection of the best human institutions, that mould them as we may, a large discretion must at last be reposed somewhere. The best, and in many cases the only security, is in the wisdom and integrity of public servants, and their identity with the people. Government can not be administered without committing powers in trust and confidence. 1 Bibb 602.—*Gibbons v. Ogden*, 9 Wheat. R. 1.—*The Providence Bank v. Billings*, 4 Pet. R. 514.—*Ex Parte Alexander*, L. J. 44.

The settled rule of this Court is a strict construction of delegated powers. 5 Ind. R. 1.—4 *id.* 301.—*Id.* 342.—5 *id.* 557.—6 *id.* 83. These decisions defined the powers of the legislature under various provisions of the new constitution. If they have led to the supposition that we could declare any statute void at pleasure, they have indeed had an evil influence. For our judicial powers are also delegated. They must receive the same strict construction which we have so often applied to those of the other departments. We hold them by the same tenure

and are bound by the same rules. We have no power over the legislature but what is given us by the constitution. In the polity of all these states, our own among the rest, judicial and legislative duties are distinguished from each other. The assembly can not grant a new trial; nor can we inquire into the necessity, policy or expediency of the laws. 4 Ind. R. 301. The third article of the constitution defines the limits of each department thus:

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"The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person, charged with official duties under one of these departments, shall exercise any functions of another," &c. 1 R. S., 48.

Young v. The State Bank, 4 Ind. R. 301, was a direct decision on a corresponding provision in the old constitution. In that case the legislature had granted a new trial. The Court, by judge *Perkins*, pithily puts the case thus: "The constitution says the legislature shall not perform a judicial act. The granting of a new trial is a judicial act. Therefore the legislature can not grant a new trial."

Apply this reasoning to our judicial powers. The constitution says the judiciary shall not perform a legislative act. The subject, necessity, policy and expediency of a law are matters of legislation. Therefore they do not belong to the judiciary. The argument is complete; the authority pertinent and conclusive as an exposition of the third article of the constitution.

Against this position there is not a single case in our own reports, but many in coincidence with it. Thus, what a law should embrace involves questions of policy more properly legislative than judicial. 5 Ind. R. 380. "Judge-made law has overrode the legislative department." *Perkins, J.*, in *Spencer v. The State*, 5 Ind. R. 46. "Whether an act is politic, or expedient, or necessary, is not a question with which the Courts have anything to do." *Bepley v. The State*, 4 Ind. R. 264. And it is the principle running through all our reports. If there be no constitutional objection to a statute, it is as absolute under our system of government as in any system. 1 Kent, Lecture 20.

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On the other side, the learning and diligence of counsel have failed to produce a standard authority, or even any decided case, in which Courts have assumed to declare a statute which did not conflict with the constitution, void, because, to the judicial mind, it appeared to be against public policy or private right.

This Court has, therefore, no duties outside of the constitution; and surely none of a legislative character conflicting with the express letter of that instrument. Courts are not to array their own reason against that of the legislature. *Smith's Comm.* 287. We can not declare an act void because it conflicts with our opinion of policy, expediency or justice. This was said by Mr. Justice *Baldwin*, of the Supreme Court of the *United States*, in *Bennett v. Bull*, 1 *Baldwin* 74. So, also, *Calder v. Bull*, 3 *Dallas R.* 386.—1 *Kent* 408.

If we had the power to look into the reasons and justice of a liquor law, where would the principle end? We might look into the justice of a tax law, or any other enactment; and thus place the representatives of the people at the feet of the judiciary. "History informs us that the arbitrary discretion of a judge is the law of a tyrant, and warns us that it may be so again." 5 *Ind. R.* 46.

That the people of the *United States* have such entire confidence in their Courts, has often been remarked to our credit by foreign travelers. *De Tocqueville*, c. 6. This sentiment, so generally cherished, imposes upon that department reciprocal obligations. The judiciary can only retain the public confidence by the means which acquired it—the independence of its action and the exalted purity of its motives.

But when the judiciary enters the lists to contest questions of necessity and expediency with the legislature, it sinks in the public estimation into a detested council of revision, such as once held sway in the polity of a sister state. *Kent*, *Lecture 20*.—*Ford's History of Illinois*.

The history and legislation of the times, particularly what was the state of the question at the adoption of the constitution, may be of some importance. *Preston v.*

Browder, 1 Wheat. R. 115.—*Rhode Island v. Massachusetts*, 12 Peters R. 657.

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It may be premised, that most of the colonies (*Virginia* as early as *March*, 1660,) enacted laws "to prevent disorders and riots in places where drink was retailed." Since the revolution, it is believed every state in the confederacy has passed laws more or less stringent in relation to the retail of spirituous liquors. At the present moment, the liquor traffic, its evils and remedies, is warmly agitated in many of the states.

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The history of the territorial and state legislation of *Indiana* shows that she has invariably held a stern hand over that traffic. Every revision of her statutes, and almost every session of the general assembly, establishes a settled policy in this respect. It would be cumbrous to make quotations and references in point.

It need only be suggested to those familiar with the history of legislation, that she has long ago adopted a qualified prohibitory policy in relation to certain classes of her people. Of this character are the several statutes forbidding any person, under heavy penalties, to sell or give any spirituous liquors to minors, inebriates, or *Indians*. In all these enactments, her right to resort to the policy of qualified prohibition is fully vindicated. These are not all contained in one act—the vagary of a single session. They are numerous, repeated, varied and amended. Such legislation assumes the policy which it implies to be correct and settled.

The pertinence of this part of legislative history, so far as it goes to the question in hand, will be generally conceded.

It is not, perhaps, so generally known, that the principle of prohibition is not a new feature in our liquor laws. It has been repeatedly adopted before, both incidentally and directly.

The prohibitory policy was incidentally or contingently adopted in 1832; though there may have been earlier instances. The proviso to the fifth section of the act of *February*, 1832, puts it in the power of a majority of the

Nov. Term, 1855. *BREWER* v. THE STATE. freeholders of each township to defeat an application for license by remonstrance. Acts of 1832, p. 261. Thus were the inalienable rights of the people of the township invaded; the power to buy and sell liquor in every township in the state where a majority remonstrated was taken away. But this Court did not declare the law void.

By an act to license groceries in the counties of *Carroll* and *Cass*, it was left to the voters of the respective townships whether the retail of liquor should be licensed or prohibited. Gen. Laws of 1842, p. 156. The provisions of this act were subsequently extended to *Clark* county, with an amending section. Laws of 1844-5, p. 103. In 1847 this law was made general, with the exception of two counties. Acts of 1847, pp. 46-7. In the following year, that qualified or indirect prohibitory policy was reviewed, and of course approved, by amending the act, giving greater efficiency. Laws of 1848, p. 15. It was again amended in 1849, as to the counties of *Decatur*, *Ripley*, *Jefferson*, *Dearborn*, *Henry*, *Ohio*, *Union*, *Parke*, &c., making it still more stringent. Acts of 1849, p. 83. At the same session, there was a separate act of a similar character for *Wabash* county. *Id.*, p. 84.

The same qualified prohibitory policy, by means of the township vote, was attempted under the new constitution, in the liquor act of 1853. It was declared unconstitutional for other reasons not going to the inhibitory feature. In commenting on that act, the Court say, "Had the people of each township voted 'no license,' there would have been no operative license law in the state for one year from *April*, 1853. And had the people so voted every year for all time to come, no license could ever have issued." *Maize v. The State*, 4 Ind. R. 342. The prohibition to retail less than a gallon was complete. During all this period, from 1832 to 1853, there was a standing prohibition and penalty against selling without license. So that the prohibitory policy as to retail was distinctly evolved.

There was a third series of legislative acts, directly adopting the prohibitory principle. Thus, in *January*, 1849, a special act was passed, prohibiting the sale of

any spirituous liquors in *Dalton* township, *Wayne* county, for any other than scientific or medicinal purposes. Acts of 1849, p. 82. At the same session a similar act was passed, prohibiting the barter or sale of spirituous liquors in *Posey* township, *Rush* county, except for medicinal or mechanical purposes. *Id.*, 85. The following year, contemporaneously with the convention, an act was passed for *Plainfield*, *Hendricks* county, prohibiting the sale of any intoxicating liquor whatever within two miles of the post-office, except for medicinal, scientific or sacramental purposes. Acts of 1850, p. 123.

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Thus was the prohibitory principle adopted partially in regard to certain classes, as *Indians*; contingently all over the state by the township vote; and in certain localities directly.

To these may be added the power conferred by charter on towns and cities to inhibit or license the sale at their pleasure; thus clearly assuming that the state had herself the power which she granted to the municipalities.

Thus has the state, by a series of enactments, at different times and in various ways, asserted the principle of prohibition whenever she deemed it expedient.

During all this period, the action of the several departments of the government was concurrent and harmonious. The Courts expounded and indorsed these prohibitory laws; the executive officers enforced them. *The State v. Stucky*, 2 Blackf. 289.—*The State v. Jackson*, 4 *id.* 49.—*The State v. Watson*, 5 *id.* 155.—*The State v. Graeter*, 6 *id.* 105.—*The State v. Freeman*, *id.* 248.—*The State v. Shearer*, 8 *id.* 262.—*Blodget v. The State*, 3 Ind. R. 403.—*The State v. Clark*, *id.* 451.—*Farrell v. The State*, *id.* 573.

Such was the state of the question when the convention which framed the present constitution assembled.

There was a proposition presented to that body, to the effect that the state should divest herself of all complicity with the traffic in liquor as a source of revenue. That was the whole extent of the proposition, and it was voted down. What was the effect of that vote? To leave the question where it found it. And perhaps it was thus dis-

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posed of, like many other propositions, because deemed to be more properly legislative than institutional.

While the convention was engaged in limiting such local legislation as these liquor acts were, they can not be supposed to have overlooked the prohibitory principle. Had that feature been obnoxious, it would have been modified. But while checking these local laws, they silently acquiesced in their principles. This is a weighty consideration as part of the history of the period. In accordance with the doctrine of this Court in 5 Blackf. 384, we can not doubt but that the convention intended to leave the liquor traffic—the prohibitory principle included—precisely where it found it, in the discretion of the legislature.

So that the state of the question when the present constitution was adopted, favors the prohibition.

Some confusion has arisen from a play on the words “regulate” and “prohibit.” It is conceded that the legislature has the power to regulate. And why? The unregulated traffic is found to be pregnant with social evils, injurious to the health and morals of the community. In brief, it is notoriously inconsistent with that “peace, safety and well-being” of the body politic, which the constitution was ordained to promote.

Hence the right of the legislature to interfere in any manner. Upon any other hypothesis, the attempt to regulate would be as much a piece of legislative despotism as the attempt to prohibit. Even prohibition itself is but one kind of regulation. The regulation, whether mild or extreme, partial or entire, is the same in principle. The difference is not in the *kind* of interference, but in the *degree*. The act which prohibits the sale of intoxicating liquor by a less quantity than a quart, a gallon, or twenty gallons at a time, is courteously called a *regulating* law. But it is too plain for argument, that such a law is inconsistent with that despotic right of property which is claimed to be secured by the constitution. Is it the right of the citizen to buy and sell and enjoy property as he pleases? If so, a gallon law is an invasion of that right.

So is every act limiting the quantity. No matter at what point you fix the limit, at two or ten gallons, or by what name you call it, regulation or prohibition, they are all in principle the same. Below the fixed point, they are all in their nature prohibitory.

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So long as those who advocate the liquor traffic deny the right of the legislature to interfere in any degree, they are consistent. On abstract principles, that species of property is as sacred as any other. The owners of liquor list it for taxation, and pay taxes upon it like other property. The reciprocal duty of government is to protect. Upon what principles are liquor dealers to be called upon to procure a license at extravagant rates, and file a bond, &c., to entitle them to vend and deal in liquors? And why, even after that, should they be restrained as to quantity, time and place? Abstractly, free traffic in liquor is as much a right of private property as free traffic in flour, or corn, or merchandise. In the abstract, any duty, or tax, or burden imposed upon it, is utterly indefensible. *Orr v. Baker*, 4 Ind. R. 86. But if it is admitted that, to conserve "the peace, safety and well-being" of society, the traffic may be regulated and restrained in any degree, the whole point of controversy is conceded. After that concession, it will require a very nice and discriminating casuist to show that, to conserve the public "peace, safety and well-being," the legislature may not, if need be, prohibit the traffic altogether.

In the abstract, all government is tyranny—all political discretion despotism—all interference to regulate the enjoyment of private property an invasion of right. Take a single example. Two men sit down to play cards for money. The room, the cards, the money, are all their own private property. By what right does the legislature call this amusement by the rough name of "gambling," and punish it accordingly? The only possible reason is, that this species of amusement is found to be prejudicial to the public morals.

A law to prohibit the sale of bread, would stand abstractly on the same principle as a law to prohibit the sale

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of liquor. Wherein do they differ? In the consequences of their use. The glutton is himself the chief sufferer. The tendency of the inebriate is, to disturb the peace and violate the decencies of society. In the end, the public purse is taxed either to support him as a pauper, or punish him as a felon.

Hence the life of a law is the reason or necessity for its enactment. While the prohibition of the sale of bread would be legislative despotism, the like prohibition in regard to liquor, *might* be a measure of profound and necessary policy.

For my own part, I could not readily conceive what government was made for, if it had not the power, both to punish crime, and suppress, if it were deemed necessary to the public good, the means, instruments and incentives to crime. Self-preservation is the first law of governmental as well as individual being. It is justly said by the Supreme Court of *Illinois*, that a government which did not possess the power to protect itself against such evils as flow from the liquor traffic, would be scarcely worth preserving. *Jones v. The People*, 14 Ill. R. 196. So *Woodbury, J.*, in the liquor cases, 5 Howard 504. It is said that these doctrines in *Howard* are not applicable. They were laid down as first principles, involved in the very idea of a sovereign state. They are applicable to all sovereignties. They were self-evident, independent of these cases, and needed not the authority even of judge *Woodbury's* great name.

Admit that the vendors of liquor do not force men to drink, the legislature may plausibly urge that they provide the means and spread the allurements which lead thousands to ruin, and that therefore they come within the proper province of legislative cognizance.

The great objection urged to every law which has any semblance of a moral or sumptuary character, is this: that if it is an immoral or indecent habit, to which a great majority are addicted, the law will be nugatory. It can not be enforced. If it is a habit which only obtains with a minority, public sentiment will ordinarily suppress it

without the aid of legislation. Hence it is urged that the liquor traffic should be left to public opinion to eradicate its evils.

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This is an admirable theory. While pursued in this state conjointly with mild legislation, it worked wonders. But it is found that there are persons so lost to all sense of right, and propriety, and self-respect, as to be utterly callous of public opinion. They know no public opinion but that of the circle of vicious indulgence in which they move. Hence the necessity of legislation on that and other evils which, at a superficial glance, would seem to belong more appropriately to the department of private morals. Of this character are many of the sections under the head of misdemeanors in the revised laws. In these and numerous other instances, it is found that actual experience creates exigencies not anticipated by mere legislative speculation.

The policy of severe laws we are not permitted to discuss. That lies between the people and those to whom they have delegated the temporary power of making laws. 4 Ind. R. 264. Whether temperance is not better promoted by the influence of education and morality than by stringent enactments, is a subject worthy of grave consideration. But we may be permitted to remark, that a sudden change of policy, or the adoption of vindictive measures, is ever to be deprecated. "They provoke resistance, when they were designed to enforce obedience." It may be observed generally of all the liquor laws of *Indiana* for the last twenty years, that if they failed to repress the evils of the liquor traffic, it was not the fault of the law. That was sufficiently stringent and vigorous. The fault was in the execution. These milder laws have always been, in particular localities, and more or less everywhere, a dead letter. Statutes can not execute themselves. In proportion to their severity, they shock the moral sense of the people and paralyze the executive arm. When even mild laws are not executed, it is extravagant to hope better things from odious enactments.

It is said that the opinion of this Court should be placed

Nov. Term, 1855. *BROWN* v. *THE STATE*. on such grounds as would withdraw the liquor question from the arena of politics. But this is clearly impossible. It will continue to agitate the public until it is definitely settled at the ballot-box. The opinion of a Court can no more make men think alike on that, or any other subject, than it can make them look alike. It was one of the despotic vagaries of *Henry* the eighth, to have an act of parliament passed to abolish all diversity of opinion. Act of April, 1539.

With far more truth has it been said, that our opinion, whatever it might be, should defend itself. Exactly so. That will be its fate. It should be such, as after the excitement of the hour has passed away, and the pressure of the moment has been lifted from us, our own "sober second thought," as well as that of the public, will approve.

It is proper to add, what was announced in the outset, that the details of the law are not before us; and this opinion is not to be regarded as covering the search and seizure clause. It is confined wholly to the question before us—the power of the legislature to restrain the sale and use.

I am, therefore, of opinion, that it was competent for the legislature to restrain the use and sale of intoxicating liquor; but that so much of the act as relates to the manufacture and agency are unconstitutional and void; but I do not put it on the ground assumed by judge *Perkins*.

What the practical effect of this ruling will be, is not for me to say. The intent with which the liquor was sold in each particular case, whether as incident to the right to manufacture or otherwise, will always be a question for the jury. It presents similar difficulties to those in *Brown v. The State of Maryland*, 12 Wheat. R. 419. The Courts will have to settle it on analogous principles.

The case for manufacturing should be reversed, and *Beebe* discharged on the merits.

The conviction for selling is right; but the record and return being defective, should for that reason only be reversed.

GOOKINS, J.—The appellant sued out a writ of *habeas corpus*, upon the allegation of an unlawful imprisonment by the sheriff of *Marion* county, who returned to the writ that the petitioner was imprisoned by virtue of two commitments issued by the mayor of *Indianapolis*, one upon a conviction for manufacturing, and the other on a conviction for selling, intoxicating liquors, in violation of the act of *February* 16, 1855, entitled “an act to prohibit the manufacture and sale of spirituous and intoxicating liquors, except in cases therein named, and to repeal all former acts inconsistent therewith, and for the suppression of intemperance.” On this return the petitioner moved to be discharged from custody. The motion was overruled, and the petitioner remanded; from which decision he appeals to this Court.

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The ground assumed for the reversal of this judgment is, that the act above mentioned is unconstitutional and void.

The discussion of the case has taken a very wide range, involving an inquiry into all the provisions of the act. It will be necessary, however, in deciding upon the validity of the commitments, to examine only those portions of it to which they relate.

The first position assumed is, that the act in question transcends the power of the legislature. The argument assumes that the constitution is a grant of powers, rather than a limitation; and that the act is not authorized by any power in that instrument expressed or implied; but that it is expressly forbidden. Before pursuing the argument, it will be proper to refer to those portions of the act which are supposed to be liable to these objections.

The first section prohibits the manufacture or sale of any spirituous or intoxicating liquors, except as in the act provided. The exceptions are wine or cider, made from fruit grown in this state by the manufacturer, (which may be sold in quantities not less than three gallons); liquors imported under the laws of the *United States*, while remaining in the original casks or packages; liquors manufactured under authority from the board of commissioners

Nov. Term, 1855. *BEANE* v. THE STATE. of the several counties, which can be sold only to agents appointed by the board; and liquors sold by such agents, for medicinal, chemical and mechanical uses only, and pure wine for sacramental use. The manufacture, keeping for sale and selling of burning fluids, perfumery, essences, chemicals, dyes, paints, varnishes, cosmetics, solutions of medicinal drugs, medicinal compounds, and any other article, compounded in part of alcohol, or other spirituous liquors, if not adapted to use as a beverage, are also excepted. All other manufacturing and selling are declared unlawful, for the doing of which certain penalties are affixed; and liquors kept for unlawful sale, accompanied by the actual sale of a portion thereof, and the vessels containing them, are declared nuisances, and liable to be destroyed on being so adjudged in a regular and formal trial, for which the act provides.

It is, perhaps, not very material whether the power of legislation, contained in the constitution, is to be regarded as a grant or as a limitation. The language is so general that it is impossible to view it in any other light than as a mere designation of the department of the government to which the power of legislation is assigned. It is as follows: "The legislative authority of this state shall be vested in the general assembly, which shall consist of a senate and house of representatives." Art. 4, sec. 1. Language could not be more general; and, admitting it to be a grant, it includes all proper subjects of legislation. Other parts of the instrument contain certain restrictions; and there are also a few subjects of legislation specifically mentioned, mostly referring to the state organization. If those specifications are to be regarded in the light of a power of attorney, which, by authorizing certain things to be done, implies a negative of all others, the instrument, as a form of government, would be wholly impracticable; and the great body of our laws must fall for the want of a foundation on which to rest. This Court has held the legislative power of the state to be supreme, except where restrictions are imposed. *Beauchamp v. The State*, 6 Blackf. 299.—*Doe v. Douglass*, 8 *id.* 10.

An argument to prove that the state is sovereign would ordinarily be regarded as quite superfluous; but when objections so radical are presented, to prove that she is not, a recurrence to the principles on which the claim rests may not be improper. The declaration of independence asserts the then colonies to be free and independent states, with full power to do all acts and things which independent states may of right do. The confederation of *July 9, 1778*, art. 2, declares that each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right not thereby expressly delegated to the *United States* in congress assembled. This provision was embodied substantially in the constitution of the *United States*, as follows: "The powers not delegated to the *United States* by the constitution, nor prohibited to the states, are reserved to the states respectively, or to the people." Amendments, art. 10.

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Principles thus clearly announced need no comment. The rights declared have not their origin in the instruments referred to. In the *American* governments, at least, they exist independently of any such declarations. The state is sovereign, with general powers to do all such things as are necessary and proper to secure the common good.

But the act is said to contravene those provisions of the bill of rights, which secure the people in the right of property, and the pursuit of happiness; and this is perhaps the most important inquiry involved in the case. Preliminary to the examination of this objection, a reference to the general scope and object of the statute seems necessary. It has been assumed in argument, that by this act the state has undertaken to engage in trade and manufacture, to create a monopoly in a particular branch of business, and take the profits to herself, which it is said she has no power to do. Without stopping to inquire whether she has or has not this power, if this construction of the act could be maintained, it would be no ground for the reversal of the judgment. The prohibitory part of the act would still be in force, which *Beebe* violated, and that

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the state has no power to manufacture and sell, does not give him the right. But this assumption is based upon a misapprehension of the objects of the statute, as declared in the title and shown by its provisions. It proceeds upon the ground that intemperance is an evil which ought to be prevented; that a proper mode of attaining that end will be to prohibit the manufacture and sale of intoxicating liquors, to be used as beverages. It concedes, however, that there are certain uses, for which they are necessary, or at least convenient, mechanical, chemical, medicinal, &c., and it endeavors to supply that necessity or convenience, through certain agents appointed for the purpose, who have no interest in and derive no profit from the business.

We come now to the main inquiry, can commerce in intoxicating beverages be outlawed? And, as necessarily resulting from this inquiry, to what department of the government does it appertain to declare whether they may or may not be?

That drunkenness is an evil, both to the individual and to the state, will probably be admitted. That its legitimate consequences are disease and destruction to the mind and body, will also be granted. That it produces from four-fifths to nine-tenths of all the crime committed, is the united testimony of those judges, prison-keepers, sheriffs, and others engaged in the administration of the criminal law, who have investigated the subject. That taxation to meet the expenses of pauperism and crime, falls upon and is borne by the people, follows as a matter of course. That its tendency is to destroy the peace, safety and well-being of the people, to secure which the first article in the bill of rights declares all free governments are instituted, is too obvious to be denied. That these evils result principally from commerce in the prohibited articles, is alleged.

The legislature have assumed in their enactment that these evils exist. Does it devolve upon this Court to declare that they do not? Suppose we enter upon the inquiry, whether so large a proportion of the pauperism and crime as is alleged does in fact result from drunkenness; or whether so large a proportion of these evils does or does

not result from commerce in liquors, who is to try these issues? To what department of the government has the constitution assigned the power of deciding questions like these? Can it be legally and constitutionally assumed that this Court knows more of the effects of this commerce, whether good or evil, than the legislature? The answer seems to be inevitable. The first section of the bill of rights declares, as has been said, that governments are instituted for the peace, safety and well-being of the people. To provide for these, no power is given to this Court; it is given to the legislature. An attempt to exercise such a power by this Court, would be itself unconstitutional, and an infringement of that instrument subversive of constitutional government. The question is not whether the law is politic or impolitic. It can be retained, repealed, or amended, as the people, through their representatives, shall require. It is simply a question of power, and one that is vital to the constitutional rights of the people. And this power is sought to be exercised upon a mere question of governmental policy. The duty clearly devolving upon this Court, of comparing a statute with the constitution, and of declaring it void because of a conflict between the two instruments, is itself a delicate one, which should always be approached with great caution, and with due respect to the legislature. But we are asked to go beyond—to overleap our own constitutional barrier, and invade their province. When we do this, what is the consequence? There is no common arbiter, because we are the tribunal of last resort. The ballot-box is powerless, for that is but traveling in a circle. Even the reforming of the constitution can not supply a remedy, for rights of the nature claimed for these which are said to be invaded, natural, inherent and inalienable, can not be relinquished to or taken away by government. Revolution and anarchy seem to be the legitimate consequences of an unauthorized assumption of power on the part of this Court. I can not consent to take that step.

But it is said that the first and eleventh sections of the bill of rights are infringed. They are as follows:

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"SEC. 1. We declare, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

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"SEC. 11. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

The record before us presents no question of search or seizure, and no objection is taken to the commitments for matters of form; but it is said that intoxicating liquors are property; and that the manufacture and sale of them can not be prohibited by law; that they can not be commercially outlawed and declared nuisances.

Here again arises the question already considered: who is to judge whether they are or are not, in the manner in which they are generally used in commerce, such property as the constitution protects? It will probably be conceded that some species of property are not thus protected. A nuisance is defined to be "anything that worketh hurt, inconvenience or damage to the public." Disorderly inns, alehouses, gaming-houses, stages for rope-dancers, mis-managed theatres, &c., are nuisances, because their tendency is to encourage idleness, to corrupt the public morals, &c. *The State v. Bertheol*, 6 Blackf. 474.—3 Blk. Comm. 215.—5 Bac. Ab. 147.—*The State v. Mullikin*, 8 Blackf. 260.—*Bepley v. The State*, 4 Ind. R. 264. In the latter case, the evidence tended to prove that *Bepley*, on a single occasion, sold liquor by a less quantity than a gallon, and suffered it to be drunk in his house; and it appeared that he had bottles of different kinds of liquor

usual in retail establishments. It was held, that a jury might convict of nuisance on that evidence. The prosecution was based upon the 17th section of the act of 1853, p. 89, which declares all places or houses wherein spirituous liquors shall be sold or bartered without license, in less quantity than one gallon, or suffered or allowed to be drunk in or about such place, to be common and public nuisances. *Stuart, J.*, in delivering the opinion of the Court, says the 17th section is not liable to any constitutional objection; that it is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly; and that with the policy or expediency of the measure the Courts have nothing to do. Language could not well be more explicit, nor its application to the point now in judgment more direct. It is not a *dictum*, but a decision bearing directly upon the question before us. This view of the subject is fully sustained by a decision of the Supreme Court of *Massachusetts*, in *Fisher v. McGirr*, reported in the second vol. Am. Law Reg. 460. *Shaw, C. J.*, in noticing a similar objection to a similar law, said: "If spirituous liquor is rightfully taken at all, it is on the ground that it is illegally kept; that being so kept, it is noxious to the public, and *de facto* a nuisance; and when it is adjudged forfeited, it is because it is so noxious, and declared to be such by law, the owner's right of property is divested by the judgment, and he can have no claim to compensation." And again, he says: "The theory of this branch of the law [the abatement of nuisances] seems to be this: That the property of which noxious and injurious use is made, shall be seized and confiscated, because, either it is so unlawfully used by the owner, or person having the power of disposal, or by some person with whom he has placed and intrusted it, and who intends to make a noxious and injurious use of it, of which the public have a right to complain, and from which they have a right to be relieved. Therefore, as well to abate the nuisance as to punish the owner, the property may justly be declared forfeited, and

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either sold for the public benefit or destroyed, as the circumstances of the case may require, or the wisdom of the legislature may direct."

We have had statutes in this state, before and since its organization, extending as far back at least as 1807, making the traffic in intoxicating liquors, under certain circumstances, unlawful, and declaring places where they were sold nuisances. And we have had numerous enactments absolutely and entirely prohibiting sales to any person in certain districts of the state, sometimes depending on the vote of the people of a township, town, or city, and sometimes without such vote, and this Court has sustained numerous convictions for the violation of such laws. Gambling apparatus, obscene books, &c., are subjects of traffic, as much so as liquors, and yet the manufacture of and commerce in them have been outlawed. R. S. 1848, p. 985, s. 122.—2 R. S. 1852, p. 441, ss. 52, 53. No copyright can exist, consistently with principles of public policy, in any work of a clearly irreligious, immoral, libelous, or obscene description. Story's Eq. Jur., s. 936, *et seq.* It may be stated as a general principle, clearly deduced from an unbroken current of authorities, that property which has become a nuisance is placed beyond the pale of the law's protection; that it may lawfully be destroyed by those who are injured by it. *Wetmore v. Tracy*, 14 Wend. 250.—*Gates v. Blancoe*, 2 Dana 158.—*Ellis v. The State*, 7 Blackf. 534.—*Meecker v. Van Rensselaer*, 15 Wend. 397.—*Bemis v. Clark*, 11 Pick. 452.—*Baker v. Boston*, 12 Pick. 184.—*Crosby v. Warren*, 1 Rich. 385.—*The State v. Doon*, 1 R. M. Charl. (Ga.) 1.—*The State of Pennsylvania v. The Wheeling Bridge Co.*, 13 Howard R. 518. Probably no case was ever more elaborately argued than the one last quoted. The interests of the two great states of *Pennsylvania* and *Virginia* were involved, as well as property to a very large amount; but these considerations, weighty as they were, were not sufficient to save the immense and costly structure from an order for its demolition, and the Court said that if the structure be declared a nuisance, there is no room for a calculation and comparison between

the injuries and benefits which it produces. This was certainly property. Nov. Term.
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There are other instances of property being commercially outlawed. The abolition of slavery in the territory northwest of the *Ohio* river, by the ordinance of 1787 and the constitution of 1816, is one. When that ordinance was adopted, slaves were held at *Vincennes* and *Kaskaskia*; and it was held by this Court, in the case of *The State v. Lasselle*, 1 Blackf. 60, that there was no doubt of the power of the legislature to enact a statute of emancipation, nor of the binding force and efficacy of the law when enacted. It is said that large sums are invested in distilleries in this state. Large as the amount may be, it is probably small in comparison to the amount that was invested in the slave trade, when it was abolished and declared piracy. The cases of seizure and confiscation of property engaged in smuggling, are too numerous and familiar to require particular reference to them. It has been suggested that the right to hold slaves is not of common law origin, from which it is inferred that they form an exception to other property. There is no difference between a vested right in property by the common law and by statute. One is as sacred as the other.

Now, as the legislature has declared the manufacture of and traffic in intoxicating beverages unlawful, and such as is kept for unlawful sale, and a sale in fact of some portion thereof, a nuisance, the question arises, has this Court the power to declare the enactment invalid? Does this Court judicially know that commerce in intoxicating beverages does not work hurt or damage to the public? that it is not injurious to the public morals or to the public health? and that it does not produce idleness, vagrancy and crime? Nay more, as this Court can not declare an act of the legislature invalid, unless its unconstitutionality is so clear as to admit of no doubt, (*The State v. Cooper*, 5 Blackf. 258; *Beauchamp v. The State*, 6 *id.* 299,) do we know, so much better than the legislature, that such effects do not flow from such a cause, as that we can declare beyond a doubt that they are wrong in their enactment?

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It has been urged that the act is a sumptuary law ; that it interferes with the abstract rights of individuals, in the pursuit of happiness, which is guaranteed by the bill of rights. The object of a sumptuary law is to restrain and limit the expenses of individuals. The act attempts nothing of the kind, nor is there any provision to prevent a person from drinking whatever he can get. It is commerce that is prohibited. The "pursuit of happiness" is a vague and indefinite term, which can have no relation to relative rights or duties. Allowing what is claimed for it, there would be an end of the criminal code. On a motion to quash an indictment for bigamy, for instance, this claim of abstract rights would receive little consideration. It is the common pretence of communists, anti-renters, and other outlaws, that society has invaded their abstract and inalienable rights ; but until society is revolutionized and instituted upon a different basis, these claims will be disallowed.

We have prohibited marriages between whites and blacks; 1 R. S. 1852, p. 361, s. 2; and have made such marriages felony; 2 *id.*, p. 422, s. 47. Personally considered, such a marriage would be a mere matter of taste; but the state deems the product of such marriages, and of commerce in liquors, an undesirable class of persons, and will yield to no clamor in favor of unalienable rights which shall override the public good.

Much has been said in argument of a distinction between the prohibition and the regulation of a traffic. The latter, it is admitted, may be done, while power to do the former is denied. The laws of this state have always absolutely prohibited the sale of liquors to minors, drunken persons, *Indians, &c.* R. S. 1843, p. 980, ss. 95, 96.—2 R. S. 1852, p. 435, s. 26. This, it is said, is but a *regulation*, because it prohibits sales to certain persons only, while if sales can be made to no persons, it amounts to a *prohibition*. But

it must be remembered that we are considering the doctrine of unalienable rights, and while this distinction has great respect to the rights of the vender, it pays none at all to those of the buyer. It claims that the vender must, at all events, have the privilege of selling; but that some may be deprived of the privilege of purchasing. As a matter of fact, it can not be denied that the inebriate, incipient or confirmed, needs protection as much as the actually drunken, the minor or the *Indian*; but all such considerations are necessarily disallowed. This same distinction between regulation and prohibition has also been supposed to apply to the quantity sold. Retailing, it is assumed, to the persons mentioned, may be prohibited, while the sale of large quantities can not be. It is difficult to see how the choice of words, between *regulation* and *prohibition*, or the quantity bartered, can have so great an influence upon a man's inalienable rights—rights which he can not relinquish if he would. It is difficult to see how, consistently with these rights, he may be absolutely prevented from buying, under a mere regulation, or how he can have an inalienable right to buy a large, but no right at all to buy a small quantity. . Again, it has been said that the admitted evils flowing from commerce in liquors may be *regulated* by imposing a tax for the license to sell; and that, as the taxing power is unlimited, the tax may be so high as to amount, not in theory but in practice, to a prohibition. Waiving the question whether, in a well-regulated government, crime or its producing cause should be made a subject of revenue, in the form of an indulgence, it is not easy to see upon what principle the abstract and inherent rights of men may be invaded indirectly, when they can not be directly. Government is not mere theory; it is eminently practical, and useful only as it is practical and substantial. To deny men their rights, in plain terms, has, at least, the merit of open straightforwardness. If that can not be done, a false pretence of raising a revenue, is not a means that will sanctify the end.

From this view of the case, it follows, that there is no middle ground on this question of power, and the conclu-

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sion is irresistible, that if the right be of the character supposed, any regulation which interdicts the sale to any person, or class of persons, in any quantity, is void as against natural right, and that all our previous legislation, for fifty years, in which this has been done, was void. Our laws heretofore have permitted sales to some persons, and prohibited them to others. The present enactment does the same, and the only difference is that the prohibition is extended beyond the former limits.

But if the power to regulate be admitted, that of prohibition follows. Chancellor *Kent* treats it as a settled question, that the power to regulate commerce contained in the constitution of the *United States*, includes the power to prohibit it altogether. 1 *Kent's Comm.*, 2d Ed., 431. On this principle the embargo laws were sustained.

The law is said to operate unequally upon certain classes of citizens. That is no sufficient argument against the legislative power. Human laws, from their inherent imperfection, would always be invalid, if this were a sufficient reason. This point was discussed with great ability, by president *Jackson*, in the celebrated proclamation of *December 10, 1832*, an argument which drew from judge *Story* the high commendation of declaring it among the ablest commentaries ever offered upon the constitution. 2 *Story's Comm. on the Const.*, s. 1096, *note*.

A position has been assumed in argument, that the 5th section of the act, which provides for the appointment of agents to vend liquors for purposes deemed lawful, conflicts with the 23d section of the bill of rights, which is as follows:

"The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

It is more easy to discover what that section does not mean, than to find any practical operation for it as a principle of government. It may be that some unforeseen event may, in process of time, transpire, which shall call the principle announced in that section into exercise, but the section of the act referred to does not seem destined

to perform that office. It was correctly argued by the appellant that the agency here provided for was an office. The relation of the agent to the public is similar to that of inspectors of provisions, measurers of wood, weighers of hay and coal, &c. It is quite evident that all men can not hold these offices or employments, and if they can not, whatever else the 23d section of the bill of rights may mean, it can have no application to the privileges or immunities there mentioned.

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Another objection taken to the act is, that it takes away the right of trial by jury. That question does not arise in this record. This is an attack upon the judgment of the mayor collaterally. The question suggested could be raised only in a case in which a jury, when demanded, had been refused. But there is no doubt that, if the statute does take away that right, it is, to that extent, void. There is, however, no Court authorized to take cognizance of any offence arising under the law, that is not provided with a jury; and such being the case, the constitutional right of the accused to be tried by jury necessarily follows. It would require an express provision denying that right to take it away. Nothing of the kind appears in the act; on the contrary, the trial by jury is in express terms recognized in most if not all the cases which can arise under it. There are but few of our acts which provide in express terms for trial by jury. In those which relate to the punishment of crimes and misdemeanors, no mention is made of trial by jury, and if this objection is well taken, there has never been a valid conviction under them. The consequence would be that all judges, and other officers concerned in the administration of justice, in every conviction of and execution for murder, and the enforcing of fines and imprisonments, were trespassers. This will scarcely be insisted upon.

Another objection taken to the act is, that it conflicts with the 19th section of the 4th article of the constitution, which is as follows:

"Every act shall embrace but one subject and matters properly connected therewith; which subject shall be ex-

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pressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The objections more specifically stated are, that the act embraces more than one subject, and matters properly connected therewith; and that those parts of the act which are upon subjects improperly embodied in it, and not mentioned in the title, are to be rejected.

If this objection prevails, the entire act is nugatory. Nothing is said in the title about penalties, and a law of this kind without a penalty is of no force; none could have been assessed against *Beebe*, and he should have been discharged. Other portions of the act provide for the appointment of agents to manufacture and sell, which do not necessarily require consideration in this case; but the argument has been pressed upon us, and while on the subject, it may be proper to notice them.

The general subject of the act has already been stated to be the suppression of intemperance; the prohibition of the manufacture and sale of liquors, except in certain cases deemed beneficial, being the means proposed for attaining that end. If it had no title, the context would show this to be the subject. The constitution does not require that the "matters properly connected with" the subject shall be mentioned in the title. Partial prohibition being the principal means, that, of course, properly appertained to the subject. Exceptions to the prohibition having been determined upon as a part of the enactment, the means of carrying them into effect were not only proper but indispensable. This includes the appointment of agents, the prescribing of their duties, &c. We have already seen that penalties were necessary to give the act any force. These, then, are all matters properly connected with the subject of the act.

It is said that we have a general law providing for the punishment of misdemeanors, and that the penalties provided for in this act should have been incorporated into that act by way of amendment, and that if placed else-

where they are void. The fact that the provisions might have been placed there is no reason why they may not be incorporated into a different statute, if applicable to its provisions. Subjects are almost infinitely divisible, and it might with equal propriety be insisted that each separate offence mentioned in the criminal code is a separate subject, as the subject of murder, of larceny, &c., as that the punishment of an offence does not appropriately range under a title whose generic terms, to-wit, the suppression of intemperance, are sufficiently broad to cover it.

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A glance at our legislative history will relieve us of any difficulty upon this question. The constitution of 1816 contained no restrictions of this kind. Under it bills were sometimes passed containing matters foreign to each other, by securing a combination of interests, when neither of the measures could have been adopted upon its own merits. Such bills were frequently passed without ever being read in either house except by their titles, which often contained, besides the general subject, the words "and for other purposes," which were vague enough for any imaginable subject to be classified under them. In this way frauds and impositions were sometimes practised, and there is a notable case shown by the journals, in which a large appropriation of money for the construction of a turnpike was incorporated into a bill for establishing a highway of no public concern, which was not discovered until the bill had passed both houses. To remedy these evils several provisions were inserted in the constitution of 1851, one of which, as we have seen, declares that an act shall contain but one subject and matters properly connected therewith, but provides that, if a foreign subject be introduced, the act, as to that only, shall be void; another is, that every bill shall be read through by sections on its final passage, and that the yeas and nays shall be entered upon the journal.

As the act under examination has a general design to which all its parts have an appropriate relation, it seems clear that it is not liable to this objection. This view is sustained by the uniform action of the legislature, since

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the adoption of the constitution, as will abundantly appear by reference to the various enactments of the present code, a few of which may be noticed.

In the title of the act organizing this Court, nothing is said about the time its terms shall be held, the occupancy of rooms assigned to the judges, the appointment of a chief justice, or the power of the judges to hold Circuit Courts, all of which are contained in the act, and each of which might be regarded either as an independent subject, or as appertaining to some other. The act for the appointment of the sheriff of this Court provides for his fees and compensation, although there is a general law on the subject of fees and salaries. The act organizing Circuit Courts contains subjects quite as incongruous as any in this, among which are the appointment and compensation of judges *pro tem.*, the appointment of elizors, their oath and bond, although we have a general law on the subject of official bonds. The following is the title of a very important act, to-wit: "An act to establish Courts of Common Pleas, and defining the jurisdiction and duties of, and providing compensation for the judges thereof." Why was not the provision for compensation placed in the act in relation to fees and salaries, if this be a valid objection? The bill which became that act was reported to the house of representatives by the chairman of the committee on the organization of Courts, who was also a member of the judiciary committee, and it was passed with great deliberation. This objection, if valid, applies to the act for selecting jurors and providing for their compensation, to numerous provisions of the practice act, to the common school law, to the justice's act, which, besides prescribing their duties generally, provides for their election, duties of the board of election, the filling of vacancies, the giving of bond, jurisdiction and practice, on most or all of which subjects there are other general statutes; and there are various other instances in which jurisdiction is given to them, such as, of tenants holding over, bastardy, &c. The act in relation to marriages (1 R. S. 362, ss. 9, 10, 11 and 12,) contains the definition of and penalties for three dis-

tinct misdemeanors, besides providing an action in favor of the state to recover another penalty, and compensation for the attorney who prosecutes the suit. In short, it is difficult to say what of the entire revision would be left, if this objection prevails. The provision of the constitution referred to was never designed to have any such effect. Its object has been stated. To give it the effect claimed for it, would make the instrument wholly impracticable, and the laws passed under it a tissue of absurdities.

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But one other objection taken to the act will be noticed. It is said to conflict with the 23d section of the 4th article of the constitution, which declares that laws shall be of uniform operation throughout the state. This conflict is supposed to be found in the 4th, 5th, 6th, 7th and 8th sections of the act, which authorize the appointment of agents to manufacture and vend liquors for purposes declared lawful, specify their qualifications, and prescribe their duties. This part of the act, it is insisted, is invalid, because it gives a discretionary power to the board of commissioners to appoint agents, or not, as they may choose; and as some may and others may not exercise the power, the operation of the law, it is said, will not be uniform. This assumption not only requires uniformity in the operation of the law, but also uniformity in subjects upon which it operates. By the same rule the criminal code will operate unequally, if no crimes shall be committed in some part of the state.

There is another answer to the objection. The power of appointing agents is not discretionary, but the commissioners are bound to exercise it. The 5th section provides that the county commissioners, at any meeting of their board, *may* appoint, &c. The rule which governs the case is correctly stated in *Smith's Commentaries on Statutes*, &c., sec. 599, as follows: "The words 'shall' or 'may' are to be construed as imperative in all cases where a public body or officers have been clothed by statute with power to do an act which concerns the public interest, or rights of third persons; and, in such cases, the execution of the power, or the doing of the thing required, may be insisted on as a duty, though the phraseology of the statute

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be permissive merely, and not peremptory." The language quoted by the commentator is that of *Nelson*, C. J., in 3 Hill 612, and the other authorities referred to fully sustain the position.

The suggestion that no person may be found willing to accept these appointments, would apply with equal force to executors, administrators, and every other public office and employment in the state.

Those which have been noticed, are the principal objections taken to the law. There are various other provisions found in the details of the act of which the appellant complains, but they do not arise in this record. Whenever they are properly presented, they will doubtless receive due consideration.

I am of the opinion that the judgment of the Court of Common Pleas ought to be affirmed.

Per Curiam.—The judgment is reversed, and the prisoner discharged.

J. Morrison, W. T. Otto, J. W. Chapman, D. Wallace, E. Coburn and J. S. Hester, for the appellant.

D. McDonald, L. Barbour, A. G. Porter, H. C. Newcomb, J. Coburn and N. B. Taylor, for the state.

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BAILMENT.

See CARRIERS.

Suit against the proprietor of a steamboat for negligence in towing a flat-boat, by which the cargo of the flat-boat was sunk and greatly damaged. There was evidence tending to show that the flat-boat had been unskillfully loaded, so as to render the towing more hazardous; but that the defendant was apprised of the fact, and that the immediate cause of the injury was the gross carelessness of the defendant, in towing the boat at an improper speed. It was also shown that the plaintiffs agreed in writing that the flat-boat should be towed at their risk.

Held, that, without the writing, the defendants were liable for the injury.

Held, also, that the writing did not exempt the defendants from liability for gross negligence.—*Wright v. Gaff et al.*, 416

BASTARD.

See PARENT AND CHILD, 5, 6.

BILL OF EXCEPTIONS.

See APPEAL, 5. EVIDENCE, 15. EXHIBIT, 1, 3, 4. PLEADING, 38. PRACTICE, 16, 17.

1. When the bill of exceptions states the order of events differently from the other portions of the transcript, the bill of exceptions will be taken as true.—*The State v. Flemmons*, 279
2. A bill of exceptions in a cause tried prior to June 1, 1853, after setting out certain evidence adduced in chief by the plaintiff, stated, "upon this evidence the plaintiff rested his case." Certain evidence adduced by the defendant was then set out, and the bill stated, "upon this evidence the defendant rested his defence." The bill then set out certain other evidence adduced by the plaintiffs, and stated, "this rebutting testimony closed the evidence in the case." *Held*, that it sufficiently appeared that the bill contained all the evidence given at the trial.—*McClure v. Pursell*, 330
3. In every bill of exceptions purporting to set out the evidence on motion for a new trial overruled, the words "this was all the evidence given in the cause," are, by a rule of the Supreme Court, to be regarded as technical, and indispensable to repel the presumption of other evidence.—*Meeker et al. v. Patty et al.*, 467
4. In a bill of exceptions taken in a cause tried before rule 30 of the Supreme Court took effect, there was no statement that the bill contained all the evidence given at the trial. *Held*, nevertheless, that the objection that the verdict was contrary to the evidence could not be noticed.—*Ausem v. Byrd*, 475

BILL OF EXCHANGE.

See SURETY.

The secretary of a private corporation drew a draft upon the treasurer for the payment of a certain sum for work done by the drawee; but the draft did not specify when it should be payable.

Held, that it could not draw interest till there was a demand on the treasurer and a refusal of payment.

Held, also, that the circumstance that the drawee had been told by a person connected with the corporation, but not with the treasury department, that there were no funds on hand, did not dispense with the necessity of such demand.—*English v. The Board of Trustees, &c.*, 437

BILL OF REVIEW.

To a bill of review, as a general rule, the same persons should be made parties who were parties to the proceeding sought to be reviewed; but they may be made complainants

or defendants according to their interests in the matter to be reviewed.—*Sloan et al. v. Whiteman*, 434

BOND.

See AMENDMENT. PLEADING, 8, 9, 30 to 32.
SUPERSEDEAS BOND.

The language of a bond was as follows: "We or either of us promise to pay the state of Indiana, for the use of the surplus revenue fund," &c., "on or before the 23d day of January, 1846, 100 dollars, with interest thereon at the rate of 7 per cent. per annum, payable in advance, commencing even date herewith, and do agree that in case of a failure to pay any instalment of interest, the said principal sum shall become due and collectable, together with all arrears of interest; and on failure to pay the principal or interest when due, 5 per cent. damages on the whole sum due shall be collected and costs. In testimony," &c. *Held*, that it plainly appeared that though the bond was to be due one year from date, yet that it was the intention of the parties that further time might be given upon payment of the annual interest.—*Shook v. The Board of Commissioners, &c.*, 461

BURDEN OF PROOF.

See DISTRESS, 3. EXECUTORS AND ADMINISTRATORS, 3. REPLEVIN, 3, 4.

1. The *onus probandi* lies upon the party who substantially asserts the affirmative of the issue.—*McClure v. Pursell*, 330
2. If the party on whom lies the burden of the issue offers no evidence, the adverse party is entitled to a judgment.—*Stout et al. v. Morgan*, 369

C.

CARRIERS.

1. Suit by A. against B., the proprietor of a canal-boat, to recover the value of a carpet-bag and its contents, alleged to have been lost by A. while in B.'s possession as a common carrier. The facts of the case were as follows: A., on his return journey from California, went aboard B.'s packet-boat at Fort-Wayne, on the Wabash and Erie canal, taking with him his carpet-bag, containing certain articles of clothing, &c., and near 4,000 dollars in gold. He paid his fare, simply as a passenger, to Lagro, another point on the canal, and deposited his carpet-bag, with the luggage of other passengers, on the deck of the boat, which was generally used for that purpose. On arriving at Lagro, the carpet-bag was missing, and it was afterwards found in the canal. The gold and clothing had been abstracted, and the circumstances showed that they had been

stolen. There was, also, evidence tending strongly to show that they had been stolen by one of the defendant's boatmen. A. made no communication to any officer of the boat, during the passage, as to the contents of the carpet-bag. The boat was provided with a small safe, and there was evidence tending to show that passengers were notified to have articles of value placed in it or keep them at their own risk; but on this point the evidence was very conflicting. The boat was in the habit of carrying articles of freight, but did not book or check baggage. The affidavit of A. was admitted on the trial to prove the contents of the carpet-bag; and there was a verdict and judgment for the amount of the gold, as well as of the clothing, &c.

Held, that the delivery by A. was, as to the carpet-bag and the articles of ordinary baggage it contained, sufficient.

Held, also, that B. was liable for the value of the ordinary articles of baggage, but not for the gold.

Held, also, that A.'s affidavit, so far as it related to the ordinary articles of baggage, was properly admitted.—*Doyle v. Kiser*, 242

2. Common carriers of passengers are not liable for articles of value not transported to supply any wants of the traveler, as such, on his journey, and not made known to the carriers or their agents, nor paid for as freight, but put aboard the conveyance by the passenger simply as baggage and so treated by himself on the journey. *Ibid.*
3. Articles treated as baggage may consist of clothing, money for defraying traveling expenses, a few books for the amusement of reading, a watch, a lady's jewelry for dressing, &c. *Ibid.*

CERTIORARI.

See COSTS, 4.

CHANCERY.

See BILL OF REVIEW. CONTRACT IN RESTRAINT OF TRADE, 6, 7. COSTS, 2. DIVORCE. ESTOPPEL, 1, 2. EXHIBIT. FAMILY SETTLEMENT. FORECLOSURE. FRAUDULENT CONVEYANCE. INFANT, 7. INJUNCTION. SPECIFIC PERFORMANCE. TIME, 1. VENDOR AND PURCHASER, 1, 9.

1. A defendant in chancery can not object, on error, that other parties were improperly made co-defendants, when he has not been injured thereby.—*English et al. v. Roche et al.*, 62
2. By the chancery practice, if affirmative matter in an answer which is made a cross bill, is not denied either by a replication or an answer to it as a cross bill, it is taken as true.—*Hale et al. v. Plummer et al.*, 121
3. That a party has mistaken or been misled as to his rights, and so failed to set up

- a defence at law, does not entitle him to relief in chancery.—*Dickerson et al. v. The Board of Commissioners, &c.*, 128
4. Chancery has no power, in any case, to appropriate choses in action to the payment of a judgment at law.—*Stewart et al. v. English et al.*, 176
5. When a party to a contract places a known trust and confidence in the other party, in a mixed question of law and fact, and acts on his opinion, and the party in whom such trust was reposed misleads him, equity will relieve.—*Peter v. Wright et al.*, 183
6. Where, in chancery, the prayer of the bill was that the answer should be without oath, an answer under oath had no other effect than as if without oath. *Ibid.*
7. Where the answer was required to be without oath, a preponderance of testimony in support of the bill was sufficient. *Ibid.*
8. Same point decided.—*Moore et al. v. McClinock*, 209
9. A decree against an infant defendant, without proof, is erroneous.—*Driver et al. v. Driver*, 286
10. Duplicity in pleading is fatal in equity as well as at law. *Ibid.*
11. Two distinct pleas in bar are not allowed in equity. *Ibid.*
12. A. and others obtained judgments at law against B., who was the owner of a tract of land, but had no other property subject to execution. *Held*, that a bill would lie on behalf of the judgment-plaintiffs to remove a cloud from the title.—*Ledyard et al. v. Chapin et al.*, 320
13. A bill in equity ought not to be dismissed for the want of proper parties.—*Dart v. McQuilly et al.*, 391
14. Bill in chancery under the R. S. 1843. Some of the defendants were notified of the pendency of the suit, as non-residents, by publication, and a decree was taken against them by default. No affidavit of their non-residence was made. A guardian *ad litem* was appointed for other defendants, who were minors, and a decree was taken against them; but it was not shown that they had any notice of the suit, by service of process or otherwise. *Held*, that the Court had not acquired jurisdiction of the persons of the defendants mentioned, and that the decree against them was, consequently, erroneous.—*Peoples et al. v. Stanley*, 410
15. A Court of equity can not appropriate choses in action of a debtor to the payment of a demand of a creditor. *Ibid.*
16. Error in matter of form, although apparent on the face of a decree, is not a sufficient ground for reversing it.—*Foote et al. v. Lejavour et al.*, 473
17. The record of a suit in chancery stated that the cause was set down for hearing upon bill, answers and depositions. A writing under seal upon which the bill was founded was copied in the bill and also made an exhibit. The record also showed that it had been proved. *Held*, that the omission to state that the cause was set down on the exhibit as well as the bill, &c., was a mere omission in a matter of form. *Ibid.*

CHOSSES IN ACTION.

See CHANCERY, 4, 15.

CLERK OF THE CIRCUIT COURT.

See CONSTITUTIONAL LAW, 7, 8.

COLOR OF TITLE.

See VENDOR AND PURCHASER, 4 to 8.

CONFESSION OF JUDGMENT.

A power of attorney purported to authorize a confession of judgment in the Circuit Court, in favor of the payee, "for the amount of the principal and interest that" might "be due on four certain promissory notes given by" the debtor. A judgment was taken by confession of the attorney, for a sum which, the record stated, was the full amount of the principal and interest due, at the taking of judgment, on the four notes specified in the warrant; but the notes were not shown, by any extrinsic testimony, to be the same notes therein referred to. The defendant having taken an appeal, the clerk certified in the transcript that four notes, which he copied therein, were placed on file in his office when the warrant was filed, and that upon them the judgment was rendered.

Held, that the warrant did not sufficiently identify the notes to authorize the judgment.

Held, also, that the certificate of the clerk, in relation to the filing of the notes and that the judgment was rendered thereon, was no part of the record.

Held, also, that the defect in the proceedings was not cured by s. 580, p. 162, 2 R. S. 1852.—*Veach v. Pierce*, 48

CONSIDERATION.

See CONTRACT IN RESTRAINT OF TRADE, 4. PARENT AND CHILD, 6. PROMISE. STATUTE OF FRAUDS, 5.

1. If A., being indebted to B., puts in the hands of C. promissory notes, or other securities, with a request that C. shall deliver them, or pay the proceeds thereof, or a sum of money less than the value thereof, as the case may be, to B., and C. promises B. that he will do so, the promise is founded upon a consideration.—*Miller v. Upton*, 53

2. A release of dower by the wife in the conveyance of the husband's real estate, is a valuable consideration, and the sum to be paid for it may be secured to the wife through a trustee, if the parties so agree.—*Hale et al. v. Plummer et al.*, 131
3. The payment of interest in advance is a sufficient consideration to support an agreement for further forbearance.—*Dickerson et al. v. The Board of Comm'rs, &c., et al.*, 128

CONSTITUTIONAL LAW.

See COURT, CIRCUIT. OFFICER.
TOWNS, I.

1. A statute requiring gratuitous services from the legal profession, or other particular class of citizens, in effect imposes a tax upon them, and is in violation of the requirement in the constitution, which provides for a uniform and equal rate of assessment and taxation upon all citizens.—*Webb v. Baird*, 13
2. Section 9, pp. 51, 52, of the acts of 1853, which professes to amend sec. 109, p. 273, 2 R. S. 1852, is unconstitutional, for not setting forth the latter section at full length.—*Rogers v. The State*, 31
3. The school law of 1852, so far as it diverts the proceeds of the sale of the sixteenth section in the several congressional townships from the use of schools in such townships respectively to the use of the school system of the state at large, is in contravention of section 7 of article 8 of the constitution.—*The State v. Springfield Township, &c.*, 83
4. The city of *Richmond* was incorporated by an act approved February 24, 1840, the 15th section of which gave the mayor, in civil and criminal cases, the jurisdiction of a justice of the peace, and the 46th section of which provided for the recovery of a penalty for the violation of any ordinance, by-law or police regulation, in an action of debt. This act was amended by an act of 1851, which declares the sale of spirituous liquors in any quantity in said city, except for the necessary uses in the arts, &c., to be unlawful; and the common council is authorized to carry out the provisions of said act, and to provide for the recovery of a penalty not exceeding, &c., for any offence. The second section gave the mayor exclusive jurisdiction of all offences committed under said act and the by-laws passed in pursuance thereof, the penalties for which were to be recovered in the manner provided in the act of incorporation. The common council passed an ordinance, pursuant to the provisions of said act, giving a penalty not exceeding, &c., for each offence, to be recovered in the manner prescribed by the charter. *Held*, that the action for the penalty for selling spirituous liquor, except, &c., under the amendatory statute, was a civil suit, and not a criminal prosecution, and, consequently, was not a bar to a prosecution by the state for the same act.—*Levy v. The State*, 281
5. A party can not be punished twice for the same act, under the same jurisdiction; but he may under different jurisdictions; as for an act in violation of the charter of a city and a penal law of the state.—*Ambrose v. The State*, 351
6. It is no objection to an indictment for an offence against a statute of a state, that the defendant is liable to punishment, for the same act, under a law of the United States.—*The State v. Moore*, 436
7. A clerk of the Circuit Court elected to supply a vacancy, under the constitution of 1851, holds his office for the full term of four years from the period of his election.—*The Governor v. Nelson*, 496
8. Section 7, of chapter 115, 1 R. S. 1852, p. 512, so far as it assumes to regulate or abridge the term of office of persons elected to the office of clerk of the Circuit Court, where vacancies have occurred, is in conflict with the provisions of the constitution on that subject, and void. *Ibid.*
9. So much of the act "to prohibit the manufacture and sale of spirituous and intoxicating liquors," &c., approved February 16, 1855, as is prohibitory of the right to manufacture such liquors, and also so much thereof as relates to the establishment of agencies and the appointment of agents to sell such liquors, is unconstitutional and void.—*Beebe v. The State*, 501

CONTEMPT.

1. An appeal can not be taken from the judgment of a Court imposing a penalty for a contempt, unless the appeal is specially authorized by statute.—*Hunter v. The State*, 423
2. There is no statute in force in this state which allows an appeal in such cases, unless, possibly, a statute in relation to an appeal by attorneys; and that seems not to be in existence. *Ibid.*
3. *Semble*, that, in the absence of any statutory provision, the modes of redressing the parties' own wrongs and punishing the inflictors of them, in cases of contempt, are, 1. By *habeas corpus*, in which a void commitment for a contempt will be disregarded, and the party discharged from custody. 2. By impeachment of the judges wrongfully exercising the power. 3. Perhaps by civil suit against those concerned in inflicting the wrong. *Ibid.*

CONTINUANCE.

1. The statute in regard to continuances in civil cases does not apply to state prosecutions.—*The State v. Flemons*, 279
2. The state, in criminal prosecutions, being represented by an officer who is not cognizant of the facts, it rarely occurs that he can make the affidavit for a continuance required in civil causes; but still some diligence must be used to prepare for a trial. The matter is left very much to the discretion of the Court, whose duty it is, on the one hand, to see that the laws are properly executed against offenders, and, on the other, that they have a trial without unnecessary delay. *Ibid.*
3. Bill to foreclose a mortgage. The defendant having pleaded certain matters in defence, the cause was continued in order to take depositions. At the next term the defendant moved for another continuance, upon his affidavit alleging that notice was given by him for taking depositions at M., &c.; that the parties attended, when the plaintiff proposed to examine two witnesses first, the defendant waiving notice, and that afterwards those of the defendant should be examined, to which arrangement he assented, fully understanding that he was to have an opportunity to examine his witnesses afterwards; that the plaintiff's witnesses were examined, consuming most of the allotted time; that one witness was examined for the defendant, when the hour of four arrived and the plaintiff refused to proceed further in taking depositions; that the officer who was taking the depositions decided that he could not proceed without the consent of the parties; that the plaintiff immediately left the town, and he had not time to serve him with another notice and take the depositions before the term; that he then had witnesses ready to be examined, by whom he expected to prove most of the matters alleged in his answer by way of defence, and that the affidavit was not made for delay, &c. *Held*, that, under the circumstances, the defendant had a right to a continuance.—*Kenton v. Spencer*, 321
4. The prisoner, indicted for arson in the Marion Circuit Court, applied for a continuance of the cause, to procure the testimony of a witness residing in Cincinnati to his good character. Twenty-one days had elapsed between the period of the prisoner's arrest under the indictment and the application for the continuance, and he had meanwhile made no effort to obtain the testimony. There is a communication, twice a day, between Indianapolis, the county-seat of Marion county, and Cincinnati, by railroad. *Held*, that the application was properly refused.—*Murphy v. The State*, 490

CONTRACT.

- See BAILMENT. CONSIDERATION, 1, 3. CONTRACT IN RESTRAINT OF TRADE. EARN-EST MONEY. FRAUD, 1. INFANT, 5. PARENT AND CHILD, 1, 5, 6. PRINCIPAL AND SURETY. PROMISE. RAILROAD COMPANY, 12, 13. SCHOOLS, 1, 5. STATUTE OF FRAUDS, 2 to 5. VENDOR AND PURCHASER, 2, 3, 8, 11.
1. An instrument under seal can not be discharged by a mere parol agreement; but where the agreement is executed, the act, coupled with the agreement, is sufficient to discharge the obligation.—*Dickerson et al. v. The Board of Commissioners, &c., et al.*, 128
 2. A. and B. covenanted with C. and D. to furnish to the latter, at their distillery, &c., a specified quantity of slop, &c., during, &c., and also to furnish "good and sufficient pens, and keep them in repair, for feeding all the hogs" that the covenantees might wish to feed on the slop so to be furnished by the covenantors. In a suit against the covenantors for not keeping the pens in repair as stipulated, they asked the Court to instruct the jury that they were only bound to keep the pens in "ordinary repair." *Held*, that the instruction was correctly refused.—*Morgan et al. v. Stevenson et al.*, 169
 3. A contract which contravenes the provisions of a statute is a nullity.—*The State Bank v. Coquillard*, 232
 4. Suit by a father for the seduction of his daughter. The second paragraph of the answer alleged, that the daughter was not, at, &c., the plaintiff's servant, but owed and was then rendering service to the defendant, as his apprentice, by virtue of a written agreement, dated January 31, 1845. The agreement, which was signed by the plaintiff and defendant, but was without seal and without acknowledgment, was set out in full. It stipulated that the daughter, then nine years old, should be bound to the defendant, as his apprentice, to learn the duties of housekeeping, for nine years from the 16th of March, 1844. In consideration of which the defendant agreed to give the daughter a year's schooling, and at the expiration of the term, to give her certain specified articles of household furniture. The answer further alleged that said agreement had not expired at the time of the seduction, nor at the birth of the child; that at the time the child was born, the daughter was living with the defendant, as his servant, and that afterwards the contract was canceled by the mutual consent of the parties. *Held*, that the instrument was not binding as an indenture of apprenticeship, under the R. S. 1843. *Held*, also, that the instrument did not give the defendant a right to control the

daughter's person, nor to compel her return.

Held, also, that the agreement operated merely as a license to the daughter to appropriate her time and wages to her own use, until she was eighteen years old; and that it was competent for the father to revoke the license, and reclaim her person at pleasure, being answerable to the defendant for a breach of the agreement, if she was taken away without just cause.

Held, also, therefore, that the paragraph was insufficient on demurrer.—*Bolton v. Miller*, 262

5. Allegations that at the time of the execution of a written contract for the sale of the vendor's interest in the joint property of himself and the purchaser, the vendor was dangerously sick; that the purchaser insisted upon purchasing his interest; that, being in a low and weak state, he signed the contract of sale; that it was made in view of his approaching death; and that he had recovered, furnish no ground for setting aside such contract, no unconscientious advantage appearing to have been taken, and no fraud being alleged.—*Wallace et al. v. McVey*, 300

6. A parol condition made at the time of such contract, that if the vendor recovered it should be set aside, is void. *Ibid.*

7. A vendor seeking to rescind a contract of sale, must offer to return the consideration received. *Ibid.*

8. Assumpsit by an infant upon a special contract, whereby she agreed to work for the defendant for a term specified, and he agreed to furnish her board, clothing, &c., and also to furnish her a cow, a bed, &c., in consideration of such service. Averment, that the plaintiff faithfully performed her part of the contract, but that the defendant wholly failed to board and clothe her properly, or to deliver the articles of property, or any of them. There was also a common count for work and labor. The evidence did not appear in the record. The Court instructed the jury that they should take into consideration the value of such a home as the plaintiff had enjoyed, &c.; her opportunity of acquiring instruction from the defendant's wife in matters of housekeeping; and the advantages resulting to her from a residence in a respectable family. *Held*, that these instructions were wrong.—*Murray v. Fry*, 371

9. Action upon a written agreement, whereby the defendants agreed to sell to the plaintiffs their entire crop of corn, at 40 cents per bushel, to be measured by the two-foot gauge, at the rate of two cubic feet per bushel; which measurement was to be final, whether the same should exceed or fall short of the statute weight. The complaint stated that, prior to the date of the agreement, the

defendants, with intent to defraud any person who might purchase the corn, had placed large quantities of rails and other substances amongst it, so as not only to conceal the same, but to form large cavities, and increase the apparent bulk of the corn; that while the corn was in this condition, it was gauged to the plaintiffs and received by them, in ignorance of the fraud, &c.; at, &c., (stating the number of bushels and the excess thereof over the real quantity). Issues of fact, &c., trial by jury, and verdict and judgment for the plaintiffs. The evidence was not set out in the record. The Court instructed the jury, that if, on account of the fraud of the defendants, the quantities of foreign substances placed among the corn, and the plaintiffs' loss, could not be precisely ascertained, the jury might regard the difference between the gauged measure and the weights, and all other facts in evidence bearing upon the question of amount, &c.

Held, that the instructions must be presumed to have been applicable to the evidence.

Held, also, that the instructions were correct.—*West et al. v. Bradley et al.*, 394

CONTRACT IN RESTRAINT OF TRADE.

1. A., B. and C., being engaged in the sale of agricultural implements in *Richmond*, as partners, purchased the stock of D. and E., who were engaged in the same business in that place, the latter agreeing in writing, in consideration of 350 dollars paid to them, not to resume said business in said place. A. afterwards purchased the interest of B. and C. in the firm. D. and E. took in another partner into their firm and resumed their trade in agricultural implements in said place. A. then filed in the Court of Common Pleas a complaint to enjoin D. and E. from prosecuting said business in said place.

Held, that the Court of Common Pleas had jurisdiction of the cause.

Held, also, that B. and C. were not necessary co-plaintiffs.

Held, also, that the circumstance that D. and E. took in another partner did not authorize them to resume said business.

Held, also, that the restraint imposed by said agreement was reasonable and valid.—*Beard et al. v. Dennis*, 200

2. A contract in general restraint of trade is void; and no contract in restraint is implied from the mere sale of the good-will of a business. *Ibid.*
3. A contract restraining a party from trading within limits that may, by the Court, be adjudged reasonable and not injurious to the public, is valid. *Ibid.*
4. Such a contract, like other contracts, must be supported by a consideration; but the

parties may agree upon what it shall be, so that it is legal; and the mere purchase of the stock in trade of a party, is a sufficient consideration for an agreement of the latter to abstain from carrying on the particular trade in the place where the purchaser is to engage in it. *Ibid.*

5. Where the stipulations in a contract in restraint of trade are divisible, and a part impose a reasonable and a part unreasonable restraints, Courts will give effect to the former and not to the latter. *Ibid.*
6. Remedies for the infringement of such contracts exist at law as well as in chancery. *Ibid.*
7. An injunction will lie to restrain the violation of such agreements. *Ibid.*

CONVEYANCE.

See *ESCHOW. FRAUDULENT CONVEYANCE. VENDOR AND PURCHASER.*

CORPORATION.

See *BILL OF EXCHANGE. RAILROAD COMPANY. SCHOOLS, 6. TOWNS.*

COSTS.

1. Petition for the allowance of a claim against a testator's estate. Answer by the executors denying the validity of the claim. Trial, and judgment for the claimant, and for costs against the executors *de bonis propriis*. The entry was afterwards amended so as to provide that the costs should be levied out of the assets of the testator in the hands of the executors to be administered, if he had so much, but if he had not, then to be levied out of the executors' own goods.

Held, that the judgment for costs, as first entered, was erroneous.

Held, also, that the judgment for costs, as amended, was proper.—*Crane et al. v. Hopkins*, 44

2. Where persons are improperly made defendants to a bill, and no decree is taken against them, the complainant should be taxed with the costs occasioned by their being parties.—*English et al. v. Roche et al.*, 62
3. A railroad act provided for an appeal from the judgment of a justice of the peace, on an assessment of damages for land taken, &c., "as in other cases." *Held*, that by reducing the plaintiff's judgment five dollars or more on the appeal, the appellant was entitled to costs.—*The Indiana Central Railway Co. v. Atkinson*, 149
4. A judgment having been rendered by a justice of the peace for the plaintiff, the defendant brought the proceedings before the Circuit Court by *certiorari*, and the judgment having been reversed, the Circuit Court tried the cause, and reduced the plaintiff's judgment more than five dollars. *Held*, under

the R. S. 1843, that the defendant was entitled to judgment for the costs before the justice and in the Circuit Court.—*Chance v. Haley*, 367

5. An appeal was taken from the judgment of a justice of the peace to the Circuit Court, in which the defendant made a material amendment of his defence. The plaintiff was an infant, and her next friend being unwilling to continue liable for the costs, was discharged, and she was allowed to prosecute, by another, as a poor person. The judgment was reduced in the Circuit Court more than five dollars. The costs of the suit up to the time of the discharge of the first next friend, including the costs of said amendment, were taxed against him. *Held*, under the R. S. 1843, that this was wrong.—*Murray v. Fry*, 371

COURT, CIRCUIT.

The Circuit Courts under the constitution of 1851 were a continuation, in a somewhat modified form, of the Circuit Courts under the constitution of 1816. Suits in them were not abated by the constitution of 1851; and the former laws regulating the practice were continued in force until changed by legislation under the latter constitution, and governed the practice of the existing Circuit Courts.—*Ross v. The Lafayette, &c., Railroad Company*, 297

COURT OF COMMON PLEAS.

See *APPEAL, 3. CONTRACT IN RESTRAINT OF TRADE, 1. HABEAS CORPUS. JURISDICTION, 4. STATUTES, 1.*

Information, in the Court of Common Pleas, against *A.*, for retailing spirituous liquor without license. Plea, that the offence was committed before the organization of said Court, and before the R. S. 1852 took effect; and that, hence, the Court had no jurisdiction thereof. Demurrer to the plea overruled, and the defendant discharged. The state prosecuted an appeal to the Supreme Court.

Held, that an appeal was maintainable.

Held, also, that the plea was sufficient.—*The State v. Daily*, 9

COURT, PROBATE.

See *EXECUTORS AND ADMINISTRATORS, 1. INFANT, 4. JURISDICTION, 1 to 3.*

COURT, SUPREME.

See *AMENDMENT, 2. BILL OF EXCEPTIONS. INSTRUCTIONS, 2, 3. NEW TRIAL. PRACTICE, 1 to 3, 16, 17.*

1. Points raised by the record may be treated as having been waived by the appellant, un-

der a rule of the Supreme Court, by a neglect to file a brief.—*Barnes et al. v. McAlilly*, 71

2. The rule requiring printed briefs in the Supreme Court was adopted in May, 1853, and took effect at the November term, 1853. This cause was submitted in May, 1854, and the plaintiff in error filed a written brief only. *Held*, that all errors were thereby waived.—*Pate v. Hull*, 285
3. A cause was submitted after May 28, 1853, and before the statute dispensing with printed briefs was enacted, on a general assignment of errors, without brief. *Held*, that the failure to specify any error was a tacit admission that none existed.—*Reno v. The State*, 308
4. Rule 30 of the Supreme Court does not apply to cases tried before June 1, 1853.—*McClure v. Pursell*, 330

COVENANT.

See VENDOR AND PURCHASER, 10.

CRIMINAL LAW.

See CONSTITUTIONAL LAW, 4 to 6, 9. CONTINUANCE, 1, 2, 4. INDICTMENT. INFORMATION. MISDEMEANOR. VERDICT, 4, 5. WABASH AND ERIE CANAL. WITNESS, 6, 7.

1. Ignorance of the law will not excuse a man from punishment on a criminal accusation.—*Winehart v. The State*, 30
2. The Court is charged with the duty of giving the law to the jury in criminal as well as in civil cases, though in the former the jury are the judges of the law and the fact.—*Murphy v. The State*, 490
3. It is not error for the Court, on the trial of a criminal prosecution, to refuse to permit counsel to read from law books in their argument to the jury. *Ibid.*
4. After the conviction of a prisoner for arson, in setting fire to a building in Indianapolis, he moved for a new trial, to enable him to prove an *alibi* by one A., who had not been examined as a witness. The affidavit stated that the prisoner had slept with A., on the night the building was burned, in Indianapolis, &c. It admitted that the prisoner remembered the fact distinctly before the trial, but alleged that he had forgotten A.'s name, and had, therefore, made no effort to obtain his testimony. *Held*, that the Court correctly overruled the motion. *Ibid.*

D.

DAM.

See WITNESS, 1.

1. Where an individual constructs a dam so as flow back water upon the land of another, it

is a presumption of law that the act is a damage, and no special damage need be proved.—*Cory v. Silcox*, 39

2. This presumption applies, in this state, as well to mill-dams as others. *Ibid.*
3. An obstruction caused by the back flowage from a dam, need not be continuous to authorize an action. *Ibid.*
4. Proceeding by A. against B. to enjoin B. from obstructing the flow of the water of a stream to A.'s mill, by the manner of erecting and maintaining a dam above it. The complaint stated that for, &c., the plaintiff had been the owner of a mill, &c., propelled by water on his own land; averred the recovery of a judgment against B. for such obstruction; that the defendant still kept up the dam, &c.; and that A.'s mill had thereby been rendered valueless. *Held*, that the complaint was not defective for omitting to show that the obstruction of the water was unnecessary to B. in the fair and reasonable use of the stream.—*Dilling v. Murray*, 324

DAMAGES.

See CONTRACT, 2, 8, 9. EVIDENCE, 2, 16. LAFAYETTE AND INDIANAPOLIS RAILROAD COMPANY. PLEADING, 33 to 35. RECOVERY. REPLEVIN, 9, 10. TROVER.

DEFAULT.

See PRACTICE, 3 to 5.

DEMAND.

See BILL OF EXCHANGE. GUARDIAN AND WARD, 6. REPLEVIN, 7. TIME, 2.

DESCRIPTION.

See FORECLOSURE, 2. MORTGAGE, 3.

DISTRESS.

1. The levy of a distress warrant constitutes of itself a distraint.—*Smith v. Downing*, 374
2. If, under the R. S. 1843, a chattel was levied upon by a distress for rent, when no rent was due, the owner was entitled to recover from the distrainer double the value of the chattel, though he had regained the possession. *Ibid.*
3. Action under s. 220, p. 830, R. S. 1843, to recover double the value of a distress. *Held*, that the averment that no rent was due was of the substance of the declaration. *Held*, also, that the burden of proving that averment was on the plaintiff. *Ibid.*
4. Plenary proof of a negative averment is not, in such a case, necessary; it being sufficient to adduce such evidence, as, in the absence of counter evidence, affords ground for presuming the averment to be true. *Ibid.*

DIVORCE.

See DOWER, 3, 5.

1. The Court has no authority, in granting a divorce to a wife, to set off to her any part of the real estate of her husband.—*Rice v. Rice*, 100
2. Alimony can only be allowed to the wife in money. *Ibid.*
3. A suit for a divorce, on behalf of the wife, was submitted for trial to a jury, who, by their verdict, found that the plaintiff was entitled to a divorce, and also ascertained the value of the husband's real estate, and set off a third of such real estate to the wife. Judgment accordingly. The Supreme Court reversed the judgment below setting off to the wife a third of the real estate, but instructed the Court below, under ss. 569 and 570, 2 R. S. 1852, p. 161, to render a judgment against the husband, instead thereof, to the amount of the value of one-third of his real estate as ascertained by the jury. *Ibid.*
4. The legal effect of a divorce is determined by the law in force when it was granted.—*Whitsell et al. v. Mills*, 229
5. By the R. S. 1831, all divorces were a *vinculo matrimonii*, and either party, after the divorce was granted, could lawfully marry. *Ibid.*

DOCKET FEE.

By the R. S. 1852, only one docket-fee can be taxed in any case, whatever may be the number of defendants.—*Bunday et al. v. The State*, 398

DOWER.

See CONSIDERATION, 2. HUSBAND AND WIFE, 1, 2.

1. The wife of a partner has an inchoate right of dower in real estate of the partnership, upon which the character of personalty has not been purposely impressed by the partners, and which is not needed to discharge the debts of the partnership, or to adjust the claims of the partners as between themselves.—*Hale et al. v. Plummer et al.*, 121
2. Dower, by the R. S. 1838, was substantially as at common law.—*Whitsell et al. v. Mills*, 229
3. Where husband and wife are divorced a *vinculo*, the wife, after the husband's death, is not his widow. *Ibid.*
4. The widow alone, at common law, is entitled to dower. *Ibid.*
5. A husband was divorced from his wife, under the R. S. 1831, and died, while the R. S. 1838 were in force, seized in fee of land. Held, that the wife thus divorced was not entitled to dower. *Ibid.*

E.

EARNEST MONEY.

Earnest money paid may be recovered back upon a failure of the party who received it to comply with his part of the contract.—*Weatherly v. Higgins*, 73

EJECTMENT.

See EXECUTION, 3.

1. In error upon a judgment against the defendant in ejectment, the supersedeas bond, under the R. S. 1843, rendered the obligors liable for the mesne profits, whether they were received by the judgment-defendant or not.—*Sherry et al. v. The State Bank*, 397
2. From a judgment against the defendant, in ejectment, he prosecuted a writ of error to the Supreme Court, and executed a supersedeas bond, with sureties, to stay further proceedings upon the judgment. The judgment having been affirmed, suit was brought on the bond. Held, that the defendants could not, in this suit, be allowed for the value of improvements made. *Ibid.*

ELECTION.

See OFFICER.

ERROR.

See CHANCERY, 1, 9, 16, 17. EVIDENCE, 6, 11, 13, 15, 19. EXECUTORS AND ADMINISTRATORS, 1, 2. PLEADING, 14, 15, 37, 39. SCIRE FACIAS, 4. VERDICT, 1.

1. In criminal prosecutions, error will lie on behalf of the state, in all cases, except where the defendant has had a verdict and judgment of acquittal, or has, at least, been put on trial before the Court or jury.—*The State v. Daily*, 9
2. If the defendant in a Court of Error rely upon a release of errors, he must plead the release specially.—*Veach v. Pierce*, 48
3. Where the declaration contains a good count, corresponding with the breach, the judgment will not be reversed on account of the inapplicability of the breach to other counts.—*Culbertson v. Townsend*, 64
4. A judgment for the plaintiff, in a suit tried on the general issue, will not be reversed merely because a material special plea was not replied to, if the facts alleged in it were admissible under the general issue.—*McClure v. Pursell*, 330
5. The plaintiff can not assign for error the dismissal of his suit, unless he excepted to the dismissal in the Court below.—*Heddy et al. v. Driver*, 350
6. A judgment will not be reversed on account of errors of the Court which were harmless.—*Van Pelt v. Corwine*, 363

7. Even though the admission of evidence was erroneous, yet if the judgment is right notwithstanding, it will not be reversed.—*Stout et al. v. Morgan*, 369
8. The party in whose favor a demurrer is decided, can not complain of the decision.—*Barker v. Hobbs*, 385
9. In a suit tried under the former practice, defects not cured by the statute of jeofails are still available on error.—*The State v. Cross et al.*, 387

ESCROW.

If a person with whom a deed is left as an *escrow*, to be delivered to the grantee upon his performance of a particular act, passes it to the latter, before he has performed such act, such possession of the grantee does not import a delivery.—*Peter v. Wright et al.*, 183

ESTOPPEL.

1. An equitable estoppel is thus described: Where the payee, upon an agreement supported by a sufficient consideration, extends the time of payment to the principal, without the consent of the surety, the latter is discharged, the payee being equitably estopped.—*Dickerson et al. v. The Board of Commissioners, &c., et al.*, 128
2. An equitable estoppel may be set up as well at law as in equity. *Ibid.*
3. If a person owning an interest in land, and being fully apprised of his rights, stands by and allows a third person to become the purchaser, knowing that he is ignorant of such rights, and suffers him to improve the property under the belief that his title is valid, the person owning such interest (even though an infant or a married woman) is guilty of a fraud, and will be estopped afterwards from asserting such interest against the purchaser.—*Galling v. Rodman et al.*, 289
4. The phrase "standing by," in such cases, does not import actual presence, but knowledge under such circumstances as render it the duty of the possessor to communicate it. *Ibid.*

EVIDENCE.

See BURDEN OF PROOF. CARRIERS, 1. DISTRESS, 3, 4. ERROR, 7. EXECUTION, 3, 4. NEW TRIAL, 1, 6 to 9. PRINCIPAL AND SURETY, 2. PROMISSORY NOTE, 2. RAILROAD COMPANY, 1.

1. In a suit against the maker of notes given for the price of goods, the defendant having offered evidence of fraudulent representations made to him by the payee concerning the goods at the time of the purchase, offered further to prove a series of sales

made by the payee to other persons, in other places, by the same sort of falsehood and misrepresentations; but it was not pretended that the defendant, at the time of his purchase, had any knowledge of the other sales, or was influenced by them. *Held*, that the evidence was irrelevant.—*Bischof v. Coffelt*, 23

2. A payment made upon a note after suit brought, is admissible in evidence to reduce the damages.—*Bischof v. Lucas*, 26
3. The statements of a witness are not necessarily to be disregarded because they differ, in slight particulars, from what he swore to on a previous occasion; but only, in such case, where the jury believe that his evidence is wilfully and knowingly false in a material matter.—*Shanks v. Hayes*, 59
4. Debt upon a judgment rendered in another state. A transcript of the judgment having been offered in evidence, the defendant objected to its admission, and having been required by the Court to point out the grounds of his objection, he stated that "there was no valid judgment recited in the transcript." The trial was while the act of 1851, "in relation to bills of exceptions," (Acts 1851, p. 47,) was in force. *Held*, that the objection was too general.—*Anderson v. Fry*, 76
5. The declarations of the assignor of a note made while he was the holder, whether that was before or after it became due, were, under the R. S. 1843, admissible in evidence, in a suit by the assignee against the maker, to impeach the consideration.—*Stoner v. Ellis*, 152
6. Evidence will be presumed to have properly been admitted, where the record does not show the contrary. *Ibid.*
7. In a suit upon a note given in consideration of the assignment of a patent, the defendant, in order to show that no patent had ever been obtained, offered in evidence, against the plaintiff's objection, a certificate of the commissioner of patents, under his seal of office, stating that no such patent had been issued. *Held*, that the certificate was not admissible. *Ibid.*
8. To justify the rejection of evidence, it must be either contradicted, or improbable, or obnoxious according to some established legal mode of testing truth.—*Peter v. Wright et al.*, 183
9. It is the peculiar province of the Court or jury trying a cause, to weigh the testimony and to decide upon its force, and their finding upon the mere weight of testimony will not be disturbed, except in a very clear case.—*Russell v. Drummond*, 216
10. Testimony must be objected to when offered, or the objection will be regarded as waived.—*Wiggins v. Keizer et ux.*, 252

11. In reviewing a decision of the Circuit Court, upon the mere weight of evidence, every reasonable intendment is to be indulged in favor of the verdict, and the decision will not be reversed if it can be sustained by any fair construction of the testimony; but if, upon a careful review of the evidence, the judgment can not be reconciled with the proof, it will be reversed.—*Chase v. Kendall*, 304
12. Parol evidence is not admissible to prove that a promise in writing, absolute on its face, was subject to a condition.—*The Madison, &c., Railroad Co. v. Stevens*, 379
13. A judgment will not be reversed on account of the improper admission or rejection of testimony, if the testimony could not have had any material influence.—*Wright v. Gaff et al.*, 416
14. A party who, by cross-examining a witness as to facts and circumstances not connected with the matters stated in his direct examination, elicits evidence to his prejudice, can not afterward object that such evidence was inadmissible. *Ibid.*
15. Where evidence was necessary to authorize a judgment of the Circuit Court, it will be presumed, in the absence of a bill of exceptions disclosing the contrary, that the Court proceeded upon proper evidence.—*Forelander v. Hicks*, 448
16. When an action has been brought for the disturbance of a certain right, and a verdict obtained for the plaintiff under the general issue, and another action for the disturbance of the same right is commenced between the same parties, the general issue being pleaded, the verdict in the former action is admissible in the second action, as strong, though not conclusive evidence to sustain the plaintiff's right; and it is also admissible to enhance the damages.—*Miles v. Wingate et al.*, 458
17. A record is an entire thing, and if admissible in evidence for any purpose, all its parts are to be received. *Ibid.*
18. Case for a nuisance occasioned by the defendant's so constructing and maintaining a roof as to cause the water to flow from it against the plaintiff's house. Plea, not guilty. The plaintiffs were allowed to give in evidence, notwithstanding the defendant's objection, the record of a former recovery in their favor against the defendant, for the same nuisance for the continuance of which the present action was brought. *Held*, that a bill of exceptions taken in the former case was properly admitted to show the identity of the subject of this suit with that of the former suit, and, as included therein, the venue; but, *held*, that it was not admissible to show that the evidence was too weak to have supported the action. *Ibid.*
19. Where the record does not profess to contain all the evidence, it will be presumed that there was sufficient to support the judgment.—*Doe v. Clark*, 466
20. Where, on the trial of a cause, a written agreement between the parties comes up collaterally, merely as evidence, and is sought to be used to the injury of one of the parties, its true character may be shown by parol evidence.—*Noble v. Epperly*, 468

EXECUTION.

See CHANCERY, 4, 12, 15. SCIRE FACIAS, 1, 2. SHERIFF'S SALE. VENDOR AND PURCHASER, 9, 11.

1. *Scire facias*, in the Circuit Court, to obtain an execution against real estate, upon the transcript of a judgment of a justice of the peace. Demurrer to the *scire facias* sustained, and judgment on the demurrer. Afterwards, in vacation, the plaintiff amended and re-filed his *scire facias*, and, at the following term, the Court awarded execution for want of an answer. No notice was given to the defendant, nor did he appear after the *scire facias* was amended. *Held*, that the awarding of the execution was error.—*Miller v. Shearer*, 50
2. A sale of land might be made without appraisalment, under the act of 1841, on an execution issued under the direction of the Circuit Court, upon *scire facias* on a justice's transcript to bind real estate.—*Mercer et al. v. Doe*, 80
3. In ejectment by the execution-defendant against the purchaser to recover land sold upon execution, the latter need only show, *prima facie*, a judgment against the former, an execution and a sale thereon, and a sheriff's deed. *Ibid.*
4. An appraisalment of land sold upon execution will be presumed to have been made, if the law required an appraisalment, until the contrary appears. *Ibid.*
5. It is not incumbent upon a sheriff to levy upon the personal property of the execution-debtor before proceeding to levy upon real estate, if the personal property is so incumbered that it would probably produce nothing upon the execution.—*Detrick v. The State Bank*, 439

EXECUTORS AND ADMINISTRATORS.

See COSTS, 1. INFANT, 2. PLEADING, 2.

1. It was error in the Probate Court, under the R. S. 1843, to order a distribution of moneys belonging to an intestate's estate, before final settlement, without directing the administrator to require a bond, with sufficient surety, for the return of the moneys, should the same be necessary for the pay-

ment of debts, &c., or to equalize the shares among those entitled thereto.—*Tapley et al. v. McGee et al.*, 56

2. Where error is prosecuted against a party as an administrator, the plea in *nullo est erratum* admits his representative character. *Ibid.*

3. A., as administrator of B., filed his account for a final settlement, which contained an item, on the credit side, of an account of one C. paid, &c. The item was supported by the account, verified by the oath of C., and his receipt to the administrator on the back thereof. The heirs of B. objected to this item, and, having appeared, they and the administrator, by agreement, submitted the validity of the credit to the Court. One of the heirs having, as the record stated, "released his interest," was offered as a witness and excluded. The trial was had under the R. S. 1843.

Held, that the burden of proof was on the heirs.

Held, also, that the release, even had it been of the interest of the witness as to the item in question, would not have rendered him competent.—*Stout et al. v. Morgan*, 369

EXHIBIT.

1. The proper mode of showing that exhibits have not been proven, is by bill of exceptions.—*English et al. v. Roche et al.*, 62
2. Exhibits, under the chancery practice, might be proved by parol.—*Gafney et al. v. Reeves*, 71
3. Evidence offered in proof of an exhibit may be placed upon record by a bill of exceptions. *Ibid.*
4. Where proof of an exhibit was necessary to support a decree, it will be presumed to have been given, unless the contrary appear by bill of exceptions or be otherwise shown by the record. *Ibid.*
5. An exhibit may be proved in chancery at the hearing, and hence the proof does not necessarily become part of the record.—*Foote et al. v. Lefavour et al.*, 473

F.

FAMILY SETTLEMENT.

Family settlements, to be held sacred, must be made in good faith. Fraud or circumvention is fatal to them. Such compromises, fairly entered into, are binding, whether the uncertainty arises upon matters of fact or of law. But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance relate to the facts or the law. Thus a Court of Equity will not sustain a family settlement, where, from a mixture of mistake of title,

personal ignorance, or liability to imposition, agreements or acts unadvised, or improvident, or made without due deliberation, are entered into. Nor will such compromises be sustained when it is apparent that the parties did not understand their rights, or the nature of the transaction. In all such cases, Courts of Equity will hold the settlement invalid, upon the common equitable principle of protecting those who are unable to protect themselves, and of whom an undue advantage is taken.—*Peter v. Wright et al.*, 183

FEES AND SALARIES.

See DOCKET FEE. STATUTES, 14.

FORCIBLE ENTRY AND DETAINER.

See VENDOR AND PURCHASER, 8.

FORECLOSURE.

See MORTGAGE, 2. PLEADING, 26, 27.
SURETY, 2, 3.

1. Where junior mortgagees are made defendants to a bill of foreclosure, and make default, the Court can not order a payment of their respective mortgages, but should merely foreclose such mortgages in favor of the plaintiff.—*Kenton v. Spencer*, 321
2. Where the land intended to be embraced in a mortgage is misdescribed, the mortgagee must have the instrument reformed before he can proceed to foreclose.—*Davis v. Cox et al.*, 481
3. Bill for foreclosure against subsequent purchasers. The land intended to be embraced in the mortgage was misdescribed therein, but correctly described in the deeds to such purchasers. The bill did not allege the misdescription nor seek to have the mortgage reformed; but the evidence showed the misdescription and tended to prove that the purchasers had knowledge of it when they bought the land. The Supreme Court ordered the bill to be dismissed without prejudice, &c. *Ibid.*

FRAUD.

See CHANCERY, 5. CONTRACT, 5, 9. ESTOPPEL, 3, 4. FAMILY SETTLEMENT. FRAUDULENT CONVEYANCE. PLEADING, 36, 37. SALE, 1, 2. VENDOR AND PURCHASER, 1, 2. WRITTEN INSTRUMENT.

1. If, in a civil case, the representations of one party, being calculated to inspire confidence, are confided in and acted upon by another as true, when they are really false, and the latter is thereby induced to enter into a contract which otherwise he would not have made, the law regards the transaction as fraudulent and void, without refer-

- ence to the motive of the party who induced the fraud.—*Bischof v. Coffelt*, 23
2. Fraud is never presumed, but must be clearly proved by the party charging it; the presumption being always against bad faith.—*Stewart et al. v. English et al.*, 176
3. Under the R. S. 1843, the question of fraudulent intent was a question of fact and not of law. *Ibid.*
4. When a party designedly produces a false impression, in order to mislead, entrap, or obtain undue advantage over another—in every such case there is fraud—an evil act and an evil intent.—*Peter v. Wright et al.*, 183
5. Fraud may be deduced not only from deceptive or false representations, but from facts, incidents and circumstances which may be trivial in themselves, but decisive in the given case of a fraudulent design. *Ibid.*

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

1. In a suit to set aside a conveyance as fraudulent against creditors, it must be shown that the vendee received the conveyance with a fraudulent intent.—*Stewart et al. v. English et al.*, 176
2. The fact that the vendee knew, at the time of the conveyance, that a suit was pending against the debtor to recover judgment for the debt, is not of itself proof of such fraudulent intent. *Ibid.*
3. The law does not prohibit a debtor, in failing circumstances, from making an assignment of his property, with a view of paying his debts, provided he does so for a full consideration and without a fraudulent intent. *Ibid.*
4. The inquiry, in a suit to set aside such a conveyance, should always be, whether the act done was a *bona fide* transaction or a mere trick or contrivance to defeat creditors. *Ibid.*

G.

GRANT.

See SCHOOLS, 4.

GUARDIAN AND WARD.

See JURISDICTION, 1, 2, 3.

1. A guardian appointed by the Probate Court, on account of the infancy of his ward, can not, after the arrival of the ward at full age, continue, under such appointment, to act as guardian, by reason of the insanity of such ward.—*Coon et al. v. Cook*, 268

2. Under the R. S. 1843, a person could not be regarded as insane, so as to authorize the appointment of a guardian, unless found to be so by a jury impaneled as therein provided. *Ibid.*

3. A person could not legally act as guardian of an insane person, under the R. S. 1843, until the fact of insanity was established by a jury, in accordance with the statute. *Ibid.*

4. The fact that though the Probate Court appointed a person as guardian on account (as was alleged in the order of appointment) of the infancy of his ward, yet that it always regarded him as guardian of an idiot, is a circumstance of no weight in determining the validity of acts done by him after the arrival of the ward at full age. *Ibid.*

5. A. was appointed guardian of B., by the Probate Court, on account of the infancy of B. After B. arrived at full age, she being an idiot, A., without having received any other appointment, made application to the Probate Court, as guardian of B., an idiot, to sell her real estate; and, having procured an order, sold the same. *Held*, that the sale was a nullity. *Ibid.*

6. Debt on a guardian's bond, dated February 13, 1833. Breach, that the guardian had received large sums, &c., the property of his wards, which he had converted to his own use, of which the relator was entitled to a sixth; that he had not accounted therefor to the relator, nor to the Probate Court, and that he had left the state and gone to parts unknown, so that a demand could not be made of him; and that the relator was twenty-one years of age. Process was served on only one of the defendants, who was a surety. He answered in several paragraphs, as follows: 1. That the cause of action did not accrue within three years before the commencement of the suit. 2. That the guardian had not been called on to account. 3. That he had complied with all the orders of the Probate Court as guardian, &c. 4. That on the 13th of February, 1844, he rendered to the Probate Court a just and true account of his guardianship, in discharge of his trust. 5. That the relator had made no demand upon the guardian for an account and a settlement. *Held*, that demurrers to these several paragraphs were correctly sustained.—*Hufford v. The State*, 365

H.

HABEAS CORPUS.

1. A judge of the Court of Common Pleas may, under the R. S. 1852, grant the writ of *habeas corpus* to a prisoner detained in the state prison under sentence for a felony.—*Miller v. Snyder*, 1

2. If the detention of the prisoner is illegal, it is the duty of the judge to deliver him therefrom. *Ibid.*
3. The detention is illegal, if by virtue of the judgment and sentence of a Court which had no jurisdiction of the cause. *Ibid.*
4. A judge of the Court of Common Pleas, upon the hearing on the return to a *habeas corpus*, may, both by the R. S. 1852, and by the general principles of law, inquire into the jurisdiction of the Court by whose sentence a prisoner is detained. *Ibid.*
5. A prisoner was committed to the county jail by the judge of the Court of Common Pleas of *Laporte* county, rightly, as an examining Court, upon a complaint charging him with the commission of a felony; but the Court, having no jurisdiction to try felonies, proceeded to the trial of the prisoner and sentenced him to confinement in the state prison. While in confinement under the sentence, he applied to the judge of the Court of Common Pleas of *Clark* county for a writ of *habeas corpus* against the warden of the state prison, to show cause why he was detained, &c. The warden having produced the prisoner, returned, as the cause of his detention, the record of the prosecution in the Court of Common Pleas of *Laporte* county, and the conviction and sentence in the case. The judge ordered the prisoner to be discharged from the state prison, and returned to the jail of *Laporte* county, to await the further action of the Courts of said county. *Held*, that the order of the Court was correct. *Ibid.*

HIGHWAY.

See APPEAL, 4.

HUSBAND AND WIFE.

See CONSIDERATION, 2.

1. A husband who has conveyed land in which his wife has an inchoate right of dower, can not, by any subsequent act, affect the interest of the wife.—*Rank v. Hanna et al.*, 20
2. Where a husband, being seized in fee of an undivided interest in land, conveys it to a third person, who, during the life of the husband, causes it to be set off to himself in severalty, the conveyance, after the husband's death, may have been never assigned out of the whole tract, as if a partition had been made. *Ibid.*
3. A husband may enter an appearance for his wife by attorney to an action.—*English et al. v. Roche et al.*, 62
4. When a married woman is the owner of real estate, the fraudulent concealment by the husband of her interest, to the prejudice of a purchaser who is ignorant thereof, can not affect the wife, unless she participated in such fraud.—*Galling v. Rodman et al.*, 289

I.

INADEQUACY OF PRICE.

See SHERIFF'S SALE, 2.

INCUMBRANCE.

See VENDOR AND PURCHASER, 10.

INDICTMENT.

See CONSTITUTIONAL LAW, 6. INFORMATION. WABASH AND ERIE CANAL.

1. An indictment charged an offence to have been committed on, &c., in the year "one thousand eight hundred and fifty-too." *Held*, that the word "too" must be construed to mean the numeral "two," and not to have been used as an adverb.—*The State v. Hedge*, 330
2. An indictment for selling spirituous liquor by retail did not allege a price for which the liquor was sold. *Held*, that the indictment was bad on motion to quash.—*Segur v. The State*, 451

INDORSEMENT.

See PROMISSORY NOTE, 1, 2, 9, 10.

INFANT.

See CHANCERY, 9. CONTRACT, 8. PARENT AND CHILD, 3 to 8.

1. An infant can not appear or plead to an action by attorney.—*Timmons et al. v. Timmons*, 8
2. An order was made for the sale of real estate of an intestate for the payment of his debts, upon the petition of the administrator. One of the defendants was a minor; but no guardian was appointed for her. The proceedings were under the R. S. 1843. *Held*, that the order was erroneous. *Ibid.*
3. An infant can not appoint an agent or attorney.—*Tapley et al. v. McGee et al.*, 56
4. An order of the Probate Court directing the payment of money of an infant distributee to a third person, as the agent of the infant, is erroneous. *Ibid.*
5. A suit will lie for services rendered by an infant under an unfulfilled special contract.—*Van Pelt v. Corvine*, 363
6. A minor attains to twenty-one years of age on the day preceding the twenty-first anniversary of his birth.—*Wells v. Wells*, 447
7. A decree against an infant, without notice and without evidence, is erroneous. *Ibid.*

INFORMATION.

See INDICTMENT. NUISANCE, 2, 4.

INJUNCTION.

See CONTRACT IN RESTRAINT OF TRADE, 7.

1. The party applying for an injunction upon the collection of a judgment, was only obliged, by the R. S. 1843, to indorse on his bill a release of errors in the judgment, when required so to do by the Court.—*Dickerson et al. v. The Board of Comm'rs, &c., et al.*, 128
2. Bill by the authorities of *Lamasco* to enjoin the defendants from constructing a wharf, at or near said place, for the reasons, 1. That they were constructing their wharf in violation of an agreement; and 2. That the wharf, when constructed, would be a nuisance. On the first point the bill alleged that the plaintiffs adopted the same plan of wharf as that of the defendants adjoining, and that the plan was made known to the defendants, or to their agents residing at *Evansville*, and seemed to be so far satisfactory that they promised to conform thereto in any wharf which they might ultimately build adjoining it. The bill also alleged that the plaintiffs were the owners of the territory on which their wharf was to be erected.
Held, that the allegations were sufficiently certain.
Held, also, that the title of the plaintiffs was sufficiently alleged.—*Laughlin et al. v. The President, &c., of Lamasco City*, 223
3. A bill for an injunction, under the R. S. 1843, was not required to be sworn to. *Ibid.*
4. A wharf is not, *per se*, a public nuisance, which the Courts will enjoin. *Ibid.*
5. An injunction will not be allowed where the injury can be compensated by damages. *Ibid.*
6. In cases of conflicting evidence, where the injury to the public is doubtful, if not imaginary, an injunction will not be allowed; nor will it be allowed when the alleged nuisance is merely eventual or contingent. *Ibid.*
7. A temporary injunction ought not to be granted to restrain the defendant from removing property, the subject of commerce, out of the jurisdiction of the Court, (such as pork and lard, suitable to be sent abroad to market,) unless the plaintiff shows that he has an immediate interest in such property, and that he will be injured by the removal, and that the interference of the Court is necessary to save him from serious loss or damage.—*Wallace et al. v. McVey*, 300
8. A temporary injunction ought not to be granted in such case, without notice to the adverse party. If the complaint shows such an emergency as will justify the interference of the Court, an order should be granted to restrain the removal, for a reasonable time, until notice can be given. *Ibid.*

INSANITY.

See GUARDIAN AND WARD, 1 to 5.

INSTRUCTIONS.

See CONTRACT, 9. NEW TRIAL, 1.

1. An instruction may properly be refused which would tend to mislead the jury.—*Weatherly v. Higgins*, 73
2. Instructions must be objected to before the return of the verdict, or all errors therein will be considered as waived. *Ibid.*
3. The Supreme Court do not regard it their duty, under the rules of the Court, minutely to examine instructions, for abstract errors, where no specific errors are pointed out.—*Heady v. Wood*, 82
4. Where a special verdict ascertains facts which are clearly sufficient to support the judgment, irrespective of other facts in relation to which an instruction is asked for and refused, the refusal of the instruction is unimportant.—*Rice v. Rice*, 100
5. Where an instruction is asked for in relation to evidence, which is not applicable to the facts proved, it may properly be refused. *Ibid.*
6. An instruction is right, if correct in its application to the evidence, although it might be erroneous as an abstract proposition.—*Shook et al. v. The State*, 113
7. An instruction will be presumed to have been pertinent to the evidence, where the contrary does not appear.—*The Franklin Insurance Co. v. Culver*, 137
8. A party can not complain of an instruction which is in his favor.—*Harris v. Pierce*, 162
9. The refusal of a specific instruction can not be alleged as error, where the instruction was given, substantially, by the Court, in a general charge.—*Morgan et al. v. Stevenson et al.*, 169
10. When the evidence is not in the record, if, upon any probable state of facts, the instructions of the Court would be correct, the existence of such facts will be presumed in support of the judgment; but if the instructions would be wrong, on every state of facts, and were calculated to direct the jury to an improper basis for their finding, they will be presumed to have misled the jury.—*Murray v. Fry*, 371
11. Instructions may properly be refused which are not pertinent to the evidence.—*Newby v. Vestal*, 412
12. Where the verdict is supported by the weight of evidence, it is immaterial what instructions the Court gave to the jury.—*Short v. Scott*, 430
13. A party waives his objections to instructions by not excepting to them.—*McKinney v. Springer*, 453

14. By omitting to except to the refusal of instructions, a party will be treated as having acquiesced in the refusal. *Ibid.*

INSURANCE.

The condition of an insurance policy issued to the plaintiff, provided that persons sustaining loss by fire, should forthwith give notice thereof, in writing, to the company or their agent, and as soon after as possible, deliver as particular an account of their loss as the nature of the case would admit of, (and if within their power, render to the company a schedule of the articles destroyed or damaged, stating article by article,) signed with their proper hands, and that they should accompany the same with their oath or affirmation, declaring the account to be just, &c., and what was the cash value of the subject insured. Whenever demanded in writing, they were also required to produce an exhibit of their books of account, and vouchers in support of their claim, and permit extracts and copies thereof to be made, &c. The conditions further provided that any fraud or false swearing by the insured, should cause a forfeiture of all claims, and be a bar to all remedies under the policy. In a suit upon the policy for a loss of the subject insured, the plaintiff exhibited the statement furnished by him to the company, under oath, as follows: "One-story frame house, 200 dollars; dry goods, 1,000 dollars; groceries, 150 dollars; queensware, 25 dollars; hardware, 25 dollars; the whole, 1,400 dollars." The statement further showed that all the bills of goods purchased by him, were consumed by the fire, and that he was therefore unable to make out an invoice of the items and cost of the articles destroyed, but that to the best of his knowledge and belief, said statement was true and just, and the fair cash value of the goods was between 1,400 and 1,500 dollars. It also appeared in evidence that the plaintiff's invoices were consumed with his goods, and that he had no copies, and that the company's secretary had called on him to sign an instrument requesting the persons from whom he had purchased the goods, to furnish the amounts of the invoices, but that he had refused to do so. The plaintiff obtained a verdict and judgment for 200 dollars less than the amount of his loss as alleged in his statement to the company.

Held, that the plaintiff was not required by the conditions of the policy to sign the instrument presented by the company's secretary.

Held, also, that the excess of the plaintiff's claim, as furnished to the company, over the verdict, did not show him to have been guilty of "false swearing."

Held, also, that by "false swearing" was meant, the swearing to a false statement knowingly.—*The Franklin Insurance Co. v. Culver*, 137

INTEREST.

See BILL OF EXCHANGE. CONSIDERATION, 8. PROMISSORY NOTE, 8. SURPLUS REVENUE, 2.

INTERROGATORIES.

See VERDICT, 3.

Interrogatories were filed to elicit evidence in support of a paragraph of an answer which was itself insufficient. *Held*, that an exception to the interrogatories was correctly sustained.—*Lamson v. Falls*, 309

J.

JEOFAILS.

See ERROR, 9.

JUDGMENT.

See AMENDMENT, 1. CONFESSION OF JUDGMENT. ERROR, 3, 4, 6. NUL TIEL RECORD. PAYMENT. PLEADING, 32. PROMISSORY NOTE, 8. SCIRE FACIAS.

1. A judgment rendered in another state by a Court which has obtained jurisdiction of the subject-matter and the parties, is conclusive in this state; and errors between the service of the summons and judgment can not be taken advantage of collaterally.—*Anderson v. Fry*, 76
2. A party to a judgment can not impeach it collaterally, on the ground that it was rendered upon false testimony.—*Dilling v. Murray*, 324

JURISDICTION.

See CHANCERY, 14. CONTRACT IN RESTRAINT OF TRADE, 1. HABEAS CORPUS, 3 to 5. JUSTICE OF THE PEACE, 1, 2, 4, 8. SPECIFIC PERFORMANCE, 6.

1. The Circuit and Probate Courts had concurrent jurisdiction, under the R. S. 1843, in cases of applications by guardians to sell real estate of their wards.—*Coom et al. v. Cook*, 268
2. The R. S. 1843 provided that in all suits and proceedings of which the Circuit and Probate Courts had concurrent jurisdiction, the Court which should first take cognizance thereof should retain such cognizance exclusively, while the same might be pending in such Court. *Ibid.*
3. Where an application was filed in the Probate Court by a guardian to sell real estate of his ward, and a sale was made under the

- order of such Court, the Circuit Court could not, under the R. S. 1843, upon a tender of the full amount of the purchase-money, take jurisdiction of a suit to compel the execution of a deed in pursuance of the sale. *Ibid.*
4. A declaration in assumpsit, in the Court of Common Pleas, in a suit commenced March 9, 1853, contained two counts, one on a note for 700 dollars, and the other for 200 dollars for money paid, &c. The damages in the conclusion of the declaration were laid at 1,500 dollars. The defendant having moved to dismiss the suit for the want of jurisdiction, the plaintiff, during the pendency of the motion, obtained leave to amend the declaration by stating the damages at 1,000 dollars; and, having made the amendment, the defendant's motion was overruled. The defendant then moved for a continuance of the cause, on account of the amendment, but the Court refused the motion.
- Held*, that, in the refusal to dismiss the suit, there was no error.
- Held*, also, that the amendment, not having materially changed the plaintiff's claim, did not entitle the defendant to a continuance.—*Epperty v. Little*, 344

JURY.

See EVIDENCE, 9.

1. A. being called as a juror and examined by the Court, touching his qualifications, said, that he had not formed or expressed an opinion in the case, nor had he formed or expressed an opinion as to which of the parties should succeed; that his mind was free to decide the case according to the evidence, though he had formed an opinion as to some of the matters in controversy. *Held*, that a challenge for cause would not lie.—*Morgan et al. v. Stevenson et al.*, 169
2. It is the province of the jury to reconcile conflicting testimony; and their finding thereon will not be disturbed, unless it is in violation of some principle of law.—*Newby v. Vestal*, 412

JUSTICE OF THE PEACE.

See COSTS, 4, 5.

1. In a suit commenced before a justice of the peace, the want of jurisdiction can be shown either before the justice or on appeal to the Circuit Court.—*Poyser v. Murray*, 35
2. The refusal of the only justice of the peace of the proper township to entertain a suit, where he was legally competent and disinterested, did not, by the R. S. 1843, authorize the plaintiff to bring the suit in another township. *Ibid.*
3. The remedy of the plaintiff, on such refusal, was by suit against the justice. *Ibid.*
4. A justice of the peace, under the R. S. 1843, could render a valid judgment against a defendant sued out of his proper township, if such defendant, having been served with process, did not appear and plead to the jurisdiction.—*The State ex rel. Sprague v. Carter*, 37
5. In a suit on the bond of a justice of the peace for his refusal to account for money collected, it appeared that he had officially received a note for collection from the relators, had collected it, and refused to account for the proceeds. *Held*, that it must be presumed, *prima facie*, against him and his sureties, that he had the right to give the receipt officially, and that his act was legal. *Ibid.*
6. In a suit originating before a justice of the peace, no great strictness as to the form of action and pleading is generally required.—*Brush v. Carpenter*, 78
7. Where matters of defence are set up by special plea, before a justice of the peace, which are admissible in evidence under the general issue, inasmuch as the defendant may avail himself of all matters admissible under that issue without plea, it is unimportant whether a motion to reject such special plea is correctly decided or not.—*Stoner v. Ellis*, 152
8. In trespass before a justice of the peace, under the R. S. 1843, the damages laid in the conclusion of the declaration constitute the amount of the plaintiff's claim, in determining the justice's jurisdiction.—*Short v. Scott*, 430

L.

LAFAYETTE.

See STATUTES, 15, 16.

LAFAYETTE AND INDIANAPOLIS RAILROAD COMPANY.

The acts of January 28, 1842, (Laws of 1842, p. 3,) and January 19, 1846, (Laws of 1846, p. 149,) gave to the *Lafayette and Indianapolis Railroad Company* the power to appropriate private property, so far as necessary for the construction of their road, and devolved upon the board of directors the duty of having the damages assessed, upon application made to them, in the manner provided in the internal improvement law of 1836.—*The Lafayette, &c., Railroad Co. v. Smith*, 249

LANDLORD AND TENANT.

See DISTRESS. USE AND OCCUPATION.

LEGISLATURE.

See SCHOOLS, 6.

LIEN.

See VENDOR AND PURCHASER, 9, 11.

LIMITATIONS, STATUTE OF.

See GUARDIAN AND WARD, 6. VENDOR AND PURCHASER, 8.

LIQUOR, SPIRITUOUS.

See CONSTITUTIONAL LAW, 4, 9. NUISANCE, 1 to 3. STATUTES, 9, 17.

LUGGAGE.

See CARRIERS.

M.

MASTER AND SERVANT.

See RAILROAD COMPANY, 9 to 11. PARENT AND CHILD, 7.

A principal is not liable to one of his servants for injuries sustained through the negligence of another servant, when both are engaged in the same business.—*The Madison, &c., Railroad Company v. Bacon*, 205

MISDEMEANOR.

1. After the organization of the Courts of Common Pleas, until the R. S. 1852 took effect, proceedings for misdemeanors might be commenced simply by filing with the clerk a written charge, verified by affidavit.—*Levy v. The State*, 281
2. An affidavit against a defendant for a misdemeanor charged him by his sur-name, alleging his christian name to be unknown. *Held*, on motion to quash, that he was sufficiently identified. *Ibid*.

MORTGAGE.

See FORECLOSURE. SURETY.

1. Section 109, 2 R. S. 1852, p. 273, was not intended to give to the mortgage creditor a general lien against the estate of the mortgagor, but to continue the mortgage, as to the mortgaged property, after the mortgagor's decease.—*Rogers v. The State*, 31
2. Where the mortgagor was not seized of the property at the time of his death, the mortgagee has his choice, of following the property, or resorting to the estate for payment; but, in such case, if he seek payment from the estate, his claim will be classed with the "general debts." *Ibid*.
3. The description in a mortgage is sufficient whenever the land intended to be mortgaged can be ascertained by it.—*English et al. v. Roche et al.*, 62
4. When the money to secure which a mortgage has been executed is fully paid, the

mortgage is *functus officio* and inoperative for any purpose.—*Ledyard et al. v. Chapin et al.*, 320

MOTION IN ARREST OF JUDGMENT.

See PRACTICE, 9, 10, 13 to 15, 18 to 20.

MOTION FOR A NEW TRIAL.

See PRACTICE, 9, 10, 13, 14, 18 to 21.

MURDER.

See VERDICT, 4, 5.

N.

NAVIGABLE STREAMS.

See WABASH AND ERIE CANAL.

The state has exclusive jurisdiction over streams within her territorial limits, which can be navigated only for short distances, at brief periods, by inferior craft, and may obstruct them at pleasure for the public good.—*Butler et al. v. The State*, 165

NEGLIGENCE.

See BAILMENT. RAILROAD COMPANY, 2 to 4, 7 to 11.

NEGRO.

See WITNESS, 6.

NEW TRIAL.

See CRIMINAL LAW, 4. MOTION FOR A NEW TRIAL. TROVER, 2. VERDICT, 1.

1. A verdict supported by competent evidence will not be disturbed on account of erroneous instructions or the admission of irrelevant evidence.—*Bischof v. Coffelt*, 23
2. The Supreme Court will more readily control the discretion of the Court below in refusing a new trial than in granting it, because the refusal operates as a final adjudication between the parties.—*Nagle v. Hornberger*, 69
3. The granting of a new trial by the Circuit Court is a matter within its sound discretion, and will not be disturbed by the Supreme Court unless a flagrant case of injustice is made to appear. *Ibid*.
4. It was held that a new trial should have been granted to the appellants in the Court below, under the special circumstances shown by an affidavit made in support of their motion, the statements in the affidavit not having been controverted by the adverse party.—*The Newcastle, &c., Railroad Co. v. Chambers et ux.*, 346
5. The truth of facts alleged in an affidavit in support of a motion for a new trial, may be controverted by the adverse party. *Ibid*.

6. An indictment was found against A., on the 21st of November, 1854, for the murder of B., alleged to have been committed on the 11th of October, 1854; and he was immediately put on trial, and found guilty of murder in the second degree. The homicide was committed when A. and B. were both drunk, and the evidence consisted chiefly of A.'s confessions, and the testimony of one C. to a threat made by A. about eighteen months before, &c. The case did not seem to be one of great aggravation. Motion for a new trial, on the affidavit of A. that he was surprised by C.'s evidence, and that it was false, which he could prove, if a new trial were granted, by persons named; that he had been in confinement ever since the death of B., and had had no opportunity to prepare, and no means wherewith to employ counsel; that the defence was made by counsel assigned to him when the case was called for trial, who knew nothing of the circumstances, except as they were developed in the evidence, &c. *Held*, that, under all the circumstances, a new trial ought to have been granted. — *Rosecrants v. The State*, 407
7. It is incumbent upon the party asking for a new trial on account of newly discovered evidence, to show, 1. That it has come to his knowledge since the trial; 2. That it was not owing to a want of diligence that he did not know it sooner; and 3. That it would probably produce a different result. — *Simpson v. Wilson*, 474
8. Where a party asks for a new trial on the ground of newly discovered evidence, he must set forth in his bill of exceptions the testimony which was submitted to the jury, so as to enable the appellate Court to judge whether the result would be changed by the new testimony, or whether the testimony would be merely cumulative. *Ibid.*
9. A new trial will not be granted to allow the introduction of merely cumulative testimony. *Ibid.*
10. The Supreme Court will presume that a new trial was properly refused by the Court which tried the cause, when the record does not show the contrary. *Ibid.*

NOTICE.

See PROMISSORY NOTE, 3, 4. RAILROAD COMPANY, 1, 12.

NUISANCE.

See INFUNCTION, 2, 4 to 6.

1. Under the act of 1853 "to regulate the retailing of spirituous liquors, and for the suppression of the evils arising therefrom," it was not necessary that a house or place wherein spirituous liquors were sold or bar-

tered, &c., without license, in a less quantity than a gallon, &c., should be kept in a disorderly manner, in order to make it a nuisance. — *Howard v. The State*, 444

2. Information, under said act, alleging that the defendant, on, &c., at, &c., not being licensed to vend spirituous liquors by retail, did keep, &c., a certain house, wherein spirituous liquors were sold, &c., in less quantities, &c., in a disorderly manner, constituting a public nuisance, &c. The affidavit did not allege that the house was kept in a disorderly manner. *Held*, on motion to quash, that the variance was immaterial. *Ibid.*
3. The 15th section of said act does not limit the provisions of the act, in regard to nuisances, to licensed houses, but extends them to such houses. *Ibid.*
4. An information, under the R. S. 1852, for maintaining a nuisance, need not describe the precise locality of the nuisance. *Ibid.*
5. Section 9 of the act for the punishment of misdemeanors, (3 R. S. 1852, p. 429,) allows the Court to order the removal of a nuisance or not, at its discretion; and, in case of such order, which must always be based upon the testimony given at the trial, the Court is competent to make the direction for its removal specific enough to guide the officer in the discharge of his duty. *Ibid.*

NUL TIEL RECORD.

In debt upon a supersedeas bond there was issue on a plea of *nul tiel record*. The Court did not formally find upon that issue; but the record showed that the issue was proved in favor of the plaintiff, and the Court rendered a general judgment upon the verdict of the jury. *Held*, that a judgment upon the plea of *nul tiel record* must be regarded as included in the general judgment. — *Sherry et al. v. The State Bank*, 397

O.

OFFICER.

See CONSTITUTIONAL LAW, 7, 8.

A. was elected clerk of Pulaski county, in August, 1845, for seven years. In 1841 the office of county auditor was created by law, but the act creating it provided that the duties thereby enjoined upon auditors should continue to be discharged by the county clerks, until auditors should be elected and qualified. In 1846 the legislature enacted that nothing in the act of 1841 should be so construed as to affect those clerks who, at the passage of the act of 1846, were exercising the functions of auditor in those counties where the number of voters did not exceed twelve hundred; but that they should continue, *ex officio*, to exercise the

duties of auditors until the number of voters should exceed twelve hundred. *B.* was elected auditor of said county in 1851, but the county had not then, nor before, nor has it since had twelve hundred voters.

Held, that *B.*'s election was illegal.

Held, also, that *A.* had a right, *ex officio*, under the constitution of 1851, to discharge the duties of auditor until the expiration of his official term as clerk.—*Huddleston v. Pearson*, 337

ONUS PROBANDI

See BURDEN OF PROOF.

OPEN AND CLOSE.

In a suit commenced before a justice of the peace, the general issue is in by statute and need not be pleaded, and the plaintiff is, therefore, entitled to open and close the argument of the cause.—*Howard v. Cobb*, 5

OYER.

1. If oyer of an unsealed instrument, when demanded, be given without objection, it becomes part of the record.—*Russell v. Drummond*, 216

2. In a suit upon a note, oyer was given of the note and also of certain indorsements of payments upon it. *Held*, that the defendant, in pleading payment, had a right to make the indorsements a part of his plea, and that the plaintiff could not have them struck out on motion. *Ibid.*

P.

PARENT AND CHILD.

See CONTRACT, 4.

1. Where a father and his adult children live together as members of a common family, there is no implied undertaking on the part of either to pay for service rendered, or board, &c., furnished; but the undertaking may arise from an express contract, or may be inferred from circumstances.—*House et al. v. House*, 60

2. The moral obligation of a father to support an adult idiot son is greater than that of a brother, where the parties are equally able. *Ibid.*

3. A Court will not make an allowance to a father for the education and support of his minor children, if his private means are sufficient for the purpose; and on an application for such allowance, the insufficiency of his private means must be shown affirmatively.—*Haase v. Roehrscheid*, 66

4. An allowance will be made out of an infant's estate for his education, if the father

is unable, out of his private means, to educate him. *Ibid.*

5. There is no implied promise from the father of a bastard child to the mother to furnish it a support.—*Wiggins v. Keiser et ux.*, 252

6. A promise by the father of a bastard child to pay the step-father for the child's support, past and future, if he will continue to support it, is binding. *Ibid.*

7. The relation of master and servant exists constructively between the father and his infant daughter, although she is actually in the service of another, provided the father has a right, at any time, to reclaim her services.—*Bolton v. Miller*, 262

8. In an action by a father for the seduction of his daughter, a seeming insensibility of the father to his daughter's disgrace, can not be shown in mitigation of damages. *Ibid.*

PARTIES.

See BILL OF REVIEW. CHANCERY, 1, 13.
CONTRACT IN RESTRAINT OF TRADE, 1.
PLEADING, 27, 28. SOERE FACIAS, 1.

PARTNERS.

See DOWER, 1. PLEADING, 3, 4.

1. After the dissolution of a partnership, the firm is not bound by the new contracts of a partner, although he was authorized to settle the business of the firm; nor has a partner a right, without the consent of his co-partner, express or implied, to appropriate the property or effects of the firm to his separate use.—*Chase v. Kendall*, 304

2. *A.*, *B.* and *C.* being partners, *C.* retired from the firm, and the business of the firm was wound up by *A.* and *B.* The firm, and also *A.* and *C.* individually, were indebted to *D.* and *E.*, another firm, and the latter, as partners and also individually, were indebted to the firm of *A.*, *B.* and *C.* After *C.*'s retirement from the last-named firm, *A.*, in a settlement with *D.*, in which the said several individual and partnership accounts of the parties were blended, gave a note payable to *D.* and *E.*, in the name of the firm of *A.*, *B.* and *C.*, for a balance found due, upon the accounts thus blended, to *D.* and *E.* *B.* afterwards paid part of the note and repeatedly promised to pay the balance. *Held*, that *B.* thereby ratified the act of *A.*, and that *A.* and *B.* were liable for the payment of the note. *Ibid.*

PATENT.

To render the assignment of a patent valid, under the act of congress approved July 4, 1836, it is not essential that it shall have been recorded.—*McKernan v. Hits et al.*, 428

PAYMENT.

See EVIDENCE, 2.

Where there are judgments of different dates against a debtor, in favor of the same creditor, he has a right to apply any voluntary payment to whichever judgment he chooses.—*Forelander v. Hicks*, 448

PLEADING.

See AMENDMENT, 2. CHANCERY, 2, 10, 11, 13. DISTRESS, 3. ERROR, 2 to 5, 8. EXECUTORS AND ADMINISTRATORS, 2. INTERROGATORIES. JUSTICE OF THE PEACE, 6 to 8. MISDEMEANOR, 2. OYER. PRACTICE, 11, 13. RECOURNMENT. REPLEVIN, 3, 4, 6, 9. SCIRE FACIAS, 4. SLANDER, 1, 3 to 7. STATUTES, 11. SURPLUS REVENUE, 1, 3.

1. The assignee of a note given for the price of goods, can not, a recovery on the note being defeated, recover the value of the goods under the common counts.—*Bischhof v. Coffelt*, 23
2. In a bill by administrators to foreclose a mortgage given to the intestate, they described themselves "as administrators of the goods," &c., "which were of" the intestate, giving his name and last residence. The bill also stated that on, &c., he died intestate, and that the complainants were duly appointed, &c. *Held*, that it sufficiently appeared that the complainants were administrators.—*English et al. v. Roche et al.*, 63
3. In assumpsit against a surviving partner, for goods sold to the firm, it is not necessary to notice the deceased partner in the declaration, but if it is done, the rules of pleading require a negative in the breach of payment by the deceased.—*Culbertson v. Townsend*, 64
4. The want of such negative can not, however, be objected to after verdict. *Ibid.*
5. *Nil debet* is bad in debt on a bond.—*Shook et al. v. The State*, 113
6. A defect in the mere form of a declaration can not be examined on demurrer to a defective plea. *Ibid.*
7. To a declaration upon an instrument which does not appear on its face to be usurious, a plea of usury must allege that an excess of interest was reserved with a corrupt intent. *Ibid.*
8. In a suit on a surplus revenue bond, an allegation in the declaration that the suit is brought "for the use of the surplus revenue fund," is mere surplusage. *Ibid.*
9. The pleader, in a suit on four surplus revenue bonds, (which contained a stipulation that in case of a failure to pay any installment of interest, the principal should become due and collectable, &c.) stated the

action to have accrued upon the non-payment of the annual instalments of interest; but the action was not brought until the principal on the last of the several bonds was due, and there was a breach to each count in which the non-payment of the bond was averred. *Held*, that the defect, if any existed, was cured by the breaches last named. *Ibid.*

10. The board of commissioners, treasurer, auditor, or any other officer who was charged by the R. S. 1843 with the duty of protecting and preserving the surplus revenue fund, was a proper relator in a suit on a bond given to secure a loan from that fund. *Ibid.*
11. Where the execution of a written instrument, referred to in the pleadings, is called in question, it must, by the R. S. 1852, be denied either by affidavit before trial, or by a pleading under oath.—*Unthank v. The Henry County Turnpike Co.*, 125
12. Sections 75 and 785 of the practice act do not apply to pleadings in denial of the execution of written instruments. *Ibid.*
13. A replication to a plea setting up a written instrument as the foundation of a defence, was not required by the R. S. 1843 to be sworn to; but if not sworn to, the execution of the instrument was not required to be proved.—*Russell v. Drummond*, 216
14. A demurrer was sustained to a paragraph of an answer, which set out, by way of defence, a written agreement. The agreement was admissible in evidence upon the trial of issues raised by other paragraphs. *Held*, (the contrary not appearing,) that the defendant must be presumed to have had the full benefit of the agreement.—*Bolton v. Miller*, 262
15. A defendant can not allege for error the overruling of a demurrer, where his defence was not prejudiced thereby. *Ibid.*
16. Suit for foreclosure. The mortgage was given to secure the payment of a note. To a paragraph of the answer setting up that neither the note and mortgage, nor copies thereof, had been filed with the complaint, the plaintiff replied that the note and mortgage were left in the clerk's office when the complaint was filed. *Held*, on demurrer, that the reply was insufficient.—*Lamson v. Falls*, 309
17. A reply is only necessary when new matter is set up in the answer. *Ibid.*
18. A demurrer to a reply was erroneously overruled, but the issue tendered by the reply was complete without it. *Held*, that the error was unimportant. *Ibid.*
19. The copy of a written instrument upon which a pleading is founded, is "filed with the pleading," within the meaning of the R. S. 1853, if it is set out in *hæc verba* in the pleading. *Ibid.*

30. Suit by the assignee of a note and of a mortgage given to secure it, for foreclosure. Answer, that the plaintiff was not the real party in interest. *Held*, that the answer was insufficient. *Ibid.*
31. A demurrer, under the code of 1852, does not extend beyond the pleading to which it is addressed.—*Mason v. Toner*, 328
22. The omission by a party to traverse a material fact alleged by his adversary, is, in effect, an admission of it.—*McClure v. Pursell*, 330
23. A count on a promissory note averred that "the defendant, by his certain note in writing, then due and payable, promised the plaintiff," &c. *Held*, on demurrer, that the undertaking of the plaintiff was sufficiently alleged.—*Epperly v. Little*, 344
24. A count which is not a nullity should not be rejected on motion.—*Heddy et al. v. Driver*, 350
25. Facts alleged in a complaint, which are not denied by the answer, are regarded as admitted.—*Hufford v. The State*, 365
26. A bill for foreclosure did not aver that the mortgagor had an interest in the premises capable of being mortgaged. It was objected for the first time, on error, that the bill was defective for the want of this averment. *Held*, that the objection, if available at all, should have been made in the Court below, at the earliest stage of the proceedings.—*Pattison et al. v. Shaw*, 377
27. A prior mortgagee is not a necessary party to a bill for foreclosure; nor is it clear that a junior mortgagee is, though he may properly be made a party. *Ibid.*
28. There is no rule of practice which authorizes a plaintiff to make the state a defendant in a cause. *Ibid.*
29. A material averment in an answer, which is not noticed by the reply, is regarded as admitted.—*Barker v. Hobbs*, 385
30. In a declaration upon an official bond payable to the state, the non-payment of the penalty need not be averred.—*The State v. Cross et al.*, 387
31. In a suit upon an official bond, the parties agreed to submit the issues of fact to a jury. *Held*, that the assessment of damages was included. *Ibid.*
32. In suits upon penal bonds, it is only upon the determination of questions of law in favor of the plaintiff, or upon a default, that the interlocutory judgment, that the plaintiff ought to recover, but because, &c., is given; and the Court may be substituted for the jury to assess the damages. *Ibid.*
33. In a claim for damages, under the R. S. 1838, for injuries to land occasioned by the construction of a public work, the same strictness is not required in the averments as in pleadings in a Court of record.—*The Martinsville, &c., Railroad Company v. Bridges*, 400
34. The written statement of the claim should show, however, whether the injury was occasioned by the passing through and appropriation of the claimant's land, or the taking of timber and other materials for which the statute provides. *Ibid.*
35. A claim for damages, governed by the provisions of the R. S. 1838, for an injury to the claimant's land occasioned by the construction of a railroad, stated that the land was injured, &c., to the amount, &c., as follows: that the road, as located, "angled" through the claimant's land, and passed over the same, &c., to the distance, &c., and over a part which was improved and cultivated; wherefore, &c. *Held*, that the statement was sufficient to enable the claimant to recover for the injury occasioned by the grading of the road, and the division of his land into inconvenient parts. *Ibid.*
36. Assumpsit against A. and B. on a note due five years after date, with interest payable annually, and if not paid when due, the principal to become due. A. was defaulted. B. pleaded the general issue, and a special plea alleging his readiness to pay the interest, but that the plaintiff fraudulently left the state to prevent a tender of it. Demurrer to the special plea sustained. *Held*, that the plea, if viewed as a plea of tender, or an excuse for not tendering the interest, was defective for not making *profer* of the money in Court. *Held*, also, that if regarded as a plea of fraud, its sufficiency was immaterial, the facts alleged being admissible under the general issue.—*Ausem v. Byrd*, 475
37. On the sustaining of the demurrer to the plea above mentioned, B. asked leave to file another plea, alleging that the note was obtained from him by the fraudulent connivance of the plaintiff and A., who represented to him that the note was payable unconditionally five years after date; that he was not a very good scholar, and that it was written in a hand which he could not readily read, &c. *Held*, that the plea was no defence to the action, and that therefore leave to file it was properly refused. *Held*, also, that had it been sufficient, yet the facts being admissible under the general issue, the refusal would have furnished no ground for reversing the judgment. *Ibid.*
38. A plea rejected on motion is no part of the record, unless made so by bill of exceptions.—*Chisman et al. v. Melne*, 487
39. If in a suit tried on the general issue, a judgment has been rendered for the plaintiff,

the judgment will not be reversed merely because a demurrer to a special plea was erroneously sustained, if the matter specially pleaded was admissible evidence under the general issue. *Ibid.*

POSSESSION.

See ADVERSE POSSESSION. REPLEVIN,
7 to 10.

Possession of a chattel, pursuant to a purchase, is *prima facie* evidence of title.—*Smith v. Downing*, 374

PRACTICE.

See AMENDMENT, 2. BILL OF EXCEPTIONS.

BURDEN OF PROOF. CHANCERY, 1, 6 to 8. COURT, SUPREME. CRIMINAL LAW, 2, 3. ERROR, 4, 5, 8, 9. EVIDENCE, 4, 10, 14, 15, 19. EXECUTION, 1. EXHIBIT. HUSBAND AND WIFE, 3. INSTRUCTIONS. INTERROGATORIES. NEW TRIAL, 5, 7, 8. NUL TIEL RECORD. OPEN AND CLOSE. PLEADING, 38, 39. VERDICT, 2 to 5.

1. The plaintiff took exceptions to instructions given by the Court below, but did not allude to them in his brief in the Supreme Court; and he was therefore presumed to have waived every objection to them.—*Howard v. Cobb*, 5
2. On the reversal of a cause in the Supreme Court and its having been remanded to the Court below for further proceedings, it was not necessary, under the R. S. 1843, that the defendants should again be summoned.—*Kirby et al. v. Holmes et ux.*, 33
3. The omission to default infant defendants who fail to appear, and to take judgment against them for want of a plea, is merely a defect in form, and can not be assigned for error. *Ibid.*
4. A defendant, while he has a plea in bar on file, can not be defaulted. *Ibid.*
5. If, in a proceeding to obtain an assignment of dower and for damages for withholding it, the defendants, having pleaded in bar, on being called, fail to appear, the plaintiff can have the damages assessed in the same manner as if the defendants had appeared and defended. *Ibid.*
6. If a judgment is rendered in form against "the defendants," it will be presumed to be against all of them. *Ibid.*
7. The plaintiff, in a suit for the backing of water by a dam upon his machinery, &c., was allowed to read extracts from "*Evans' Millwright Guide*," in his closing argument to the jury, although the defendant objected. The Court instructed the jury that extracts read from a scientific work were not even *prima facie* of authority, but like the argument of counsel, or other thing adduced to illustrate, they might be satisfactory to the jury or they might not. *Held*, that there was no error.—*Cory v. Silcox*, 39
8. In a cause where several issues of fact were raised by the pleadings, the Court, in its charge to the jury, stated that there were but two questions, specifying them, for their consideration, the other facts not being controverted. The evidence not having been set out in the record, *held*, that the presumption was that the parties had narrowed the issue to the questions stated by the Court. *Ibid.*
9. A party after moving in arrest of judgment can not move for a new trial.—*Hord v. The Corporation of Noblesville*, 55
10. A party who has neglected to move for a new trial or in arrest of judgment, can not afterward object to the form of the verdict.—*Weatherly v. Higgins*, 73
11. A motion to strike out does not perform the office of a demurrer, either under the old or new practice.—*Port v. Williams*, 219
12. Where the matter contained in a paragraph of an answer is insufficient as a defence to the action, yet if it is pertinent to the case and does not appear to be a sham defence, it can not be struck out on motion. *Ibid.*
13. A motion for a new trial will not be entertained after a motion in arrest of judgment.—*Van Pelt v. Corvine*, 363
14. Same point decided.—*Sherry et al. v. The State Bank*, 397
15. A motion in arrest of judgment will not lie for the improper admission or exclusion of evidence, nor for the improper giving or refusal of instructions.—*Howard v. The State*, 444
16. To make a ruling of the Circuit Court the subject of review in the Supreme Court, it must have been excepted to when it was made.—*McKinney v. Springer*, 453
17. Where no exception has been taken to the admission of evidence in the Court below, its admissibility will not be examined in the Supreme Court. *Ibid.*
18. A motion in arrest of judgment is an affirmation of the verdict, and a motion for a new trial can not afterwards be entertained, unless the cause upon which it is founded was discovered after the motion in arrest was made. *Ibid.*
19. Where a party has moved in arrest of judgment, he can not afterwards take the opinion of the Court on the sufficiency of the evidence on a motion for a new trial.—*Doe v. Clark*, 466
20. A motion in arrest of judgment is in effect an admission that the verdict is in accordance with the weight of evidence, and when it precedes a motion for a new trial, the

latter motion is unavailing.—*Chrisman et al. v. Melne*, 487

21. In a cause tried since the R. S. 1852 took effect, a motion for a new trial, which is not in writing, can not be noticed.—*Addleman v. Erwin et al.*, 494

22. Where the issues of fact in a cause are submitted to the Court for trial, either party may require the Court to make a special statement of the facts and the questions of law decided thereon; and by then excepting to the decision, such party may properly prepare the case for review in the Supreme Court. *Ibid.*

PRINCIPAL AND AGENT.

See AGENT.

1. When a man is known to be contracting merely as the agent of another, who is also known as the principal, his contracts, if he possesses full authority for the purpose, will be deemed the contracts of the principal only.—*Robeson et al. v. Chapman et al.*, 352
2. An agent may bind his principal by acts, and sometimes by omissions of duty, but he can not bind others.—*The Board of Commissioners, &c., v. Cox*, 403

PRINCIPAL AND SURETY.

See ESTOPPEL, 1. PROMISSORY NOTE, 3. SURETY.

1. An agreement with the principal to enlarge the time for the payment of a debt, must be founded upon a consideration, in order to discharge the surety.—*Shook et al. v. The State*, 113
2. Where the relation of principal and surety exists between the makers of a written instrument, though the instrument be wholly silent as to which is surety, and even be joint and several, the makers, as against the payee or obligee, for the purpose of letting in any act of the latter tending to affect the collateral relations of the makers, may show the true relation of the makers to each other.—*Dickerson et al. v. The Board of Comm'rs, &c.*, 128
3. An agreement with the principal, in order to release the surety in a written instrument, need not operate to release the debt. *Ibid.*
4. A surety will be discharged by any agreement of the creditor with the principal, which, if violated, would give the surety a right of action. *Ibid.*
5. It is not necessary, to discharge the surety, that the agreement should be such as he could plead in bar of a suit; it is sufficient if it fetter and embarrass the discretion of the creditor. *Ibid.*
6. An agreement of a creditor with the principal debtor to delay the collection of the debt, must be founded on a consideration in

order to discharge the sureties.—*Shook v. The Board of Comm'rs, &c.*, 461

PROMPT.

See PLEADING, 36.

PROMISE.

See PARENT AND CHILD, 1, 5, 6.

An express promise can only revive a precedent good consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.—*Wiggins v. Keizer et ux.*, 252

PROMISSORY NOTE.

See ATTORNEY, 2. EVIDENCE, 5, 7. OYER. PARTNERS, 2. PLEADING, 1, 20, 23, 36. RAILROAD COMPANY, 13. USURY, 2.

1. The R. S. 1843 so far removed the distinction which previously prevailed, in regard to the transfer of negotiable paper before and after due, as to let in the same defences against a note assigned before as against one assigned after maturity.—*Stoner v. Ellis*, 152
2. If A. execute a note to B., and C. indorse the same, parol evidence is admissible to show that A. intended to be held as a surety or a guarantor.—*Harris v. Pierce*, 162
3. A surety in a note is liable on the default of the principal, without notice. *Ibid.*
4. The insolvency of the maker of a note renders a notice of non-payment to the guarantor unnecessary. *Ibid.*
5. The payment of a note by a third person, at the request of the maker, does not vest in the former any interest in the note, but raises merely an assumpsit against the maker for money paid to his use.—*Russell v. Drummond*, 216
6. Suit upon a note, due December 25, 1852, containing a stipulation that it might be discharged in notes on good solvent men, due when the note in suit should mature. Held, that up to the close of the 25th of December, 1852, the maker might have discharged the note in suit by a tender of notes as stipulated, but that upon a failure to do so by that time, he became liable as on a purely money demand.—*Mason v. Toner*, 328
7. A note was made payable by the makers when able. In a suit against them upon the note, it was proved that when they made it they had a stock of goods worth 3,000 dollars.

Held, that the note matured so soon as the makers were able to pay it.

Held, also, that the evidence showed, *prima facie*, that they were able to pay the note as soon as it was given.—*Veasey et al. v. Reeves et al.*, 406

8. A note was made payable five years after date, with interest payable annually, and if not paid when due, the principal to become due.

Held, that a judgment for the principal and interest before the lapse of the five years, the interest not having been paid as stipulated, was proper.

Held, also, that the practice of entering judgment in such cases for the whole demand, but with leave to take out execution only as the amounts become due, does not prevail in this state.—*Ausem v. Byrd*, 475

9. A blank indorsement of a note, in the absence of evidence showing when it was made, will be presumed to have been made at the date of the note.—*Cecil v. Mix et al.*, 478

10. A. and B., of *Lafayette*, being indebted to C., who resided in a different county, C. sent to an agent at *Lafayette* a request to secure the debt. The agent returned a note (which was made payable at the *Lafayette* branch of the state bank) signed by A. and B. and indorsed in blank by D. There was no other evidence of the date of the indorsement. C. having afterwards indorsed his name in blank below D.'s, delivered the note to the plaintiff. *Held*, that D. was to be regarded as one of the makers. *Ibid.*

R.

RAILROAD COMPANY.

See COSTS, 3. LAFAYETTE AND INDIANAPOLIS RAILROAD COMPANY. PLEADING, 33 to 35. REMEDY. WITNESS, 2.

1. The charter of a railroad company required that notice of the demand for the payment of instalments on subscriptions, should be published in a newspaper, &c., at least three weeks prior to the day the instalments became due. In a suit to recover instalments, a copy of the publication made in the newspaper, accompanied by the publisher's oath that it had been so published for three weeks, was produced in evidence. On objection that the three successive papers in which the notice was published were not produced, *held*, that the evidence was *prima facie* sufficient.—*Unthank v. The Henry County Turnpike Company*, 125
2. Section 2 of the act of 1853 to provide compensation to the owners of animals killed or injured by the cars, &c., of any railroad company, &c., excludes from the consideration of the jury, in a suit against any such

company for the destruction of stock by their cars, any consideration of the question whether the injury was the result of wilful misconduct or negligence, or of unavoidable accident.—*The Lafayette, &c., Railroad Co. v. Shriner*, 141

3. That act is not applicable to a case where the injury is done by the cars at the crossing of a public street in a city, the company having no right to erect a fence thereon. *Ibid.*

4. In a suit, under the common law, against a railroad company, for an injury done by their cars to animals, the question whether the injury was occasioned by negligence, misconduct, or unavoidable accident, is open for the consideration of the jury. *Ibid.*

5. The common law imposes on the owner of domestic animals the duty of keeping them on his own land or within enclosures, and he becomes a wrong-doer if any of them escape or stray off upon the lands of another person. *Ibid.*

6. This, as a general rule, is the law in this state. *Ibid.*

7. If an animal is wrongfully on the track of a railroad, but is injured, while on the same, by the gross negligence or wilful misconduct of the company's agents, the company is liable. *Ibid.*

8. The law requires that a train of cars, in passing through a town, shall be run with a greater degree of care, and hence at a less rate of speed, than is generally observed in the movement of the train. *Ibid.*

9. Section 3, p. 426, 1 R. S. 1852, which gave to the wife, or in case there was no wife, then to the minor children of a person killed by the negligence or unskilfulness of the officers or servants of a railroad company, &c., a right of action against the company, was repealed by implication by sec. 784, p. 205, 2 R. S. 1852.—*The Pres't and Directors of the Peru, &c., Railroad Company v. Bradshaw*, 146

10. Same point decided.—*The Madison, &c., Railroad Company v. Bacon*, 205

11. Complaint by a widow against a railroad company, to recover damages for the loss of her husband, who was killed, as the complaint alleged, while traveling as a passenger in one of the defendants' cars. Answer, that the husband was not a passenger, but a servant of the company, and that the accident by which he lost his life happened through the negligence of his fellow-servants acting with him in the management of the train. *Held*, that the answer was sufficient. *Ibid.*

12. A subscription of stock to a railroad company contained a provision that the stock subscribed should be paid in cash at such times and places as should thereafter be di-

rected by the directors of the company, and should be applied to the construction of the road.

Held, that the subscription could not become payable until the directors, at a regular meeting, had fixed the time and place of payment.

Held, also, that it was not necessary to give notice to the subscriber of the time and place of payment.—*Ross v. The Lafayette, &c., Railroad Company*, 297

13. *A.*, by his note, promised to pay to the *Terre-Haute and Richmond Railroad Company* 200 dollars, in consideration that they would locate their depot on block 94 in *Indianapolis*, to be paid when the company should commence the construction of the depot. When the note was given, the line of road provided for by the charter of said company extended from *Terre-Haute*, through *Indianapolis*, to *Richmond*, a distance of 150 miles. The company afterwards procured from the legislature, and accepted, an alteration of their charter, by which their line of road was limited to the distance between *Terre-Haute* and *Indianapolis*, being thus reduced in length one-half, and the other part of the line was placed under a separate corporation denominated the *Indiana Central Railway Company*, which constructed its road, and located its depot in another part of *Indianapolis*. The first-named company constructed only a freight-depot on said block 94. *A.* was not a stockholder in the company nor a party to the charter.

Held, that by the alteration of the charter of the *Terre-Haute and Richmond Railroad Company* and the acceptance thereof by the company, the company became substantially a different corporation, and were unable to perform the condition upon which the note was to become payable.

Held, also, that the circumstance that the depot located on block 94 was of some advantage to *A.*, was of no importance.—*Carliste v. The Terre-Haute, &c., Railroad Company*, 316

READING LAW TO THE JURY.

See CRIMINAL LAW, 3. PRACTICE, 7.

RECORD.

See EVIDENCE, 16 to 18.

RECOURPMENT.

A recoupment of damages was not allowed, under the former practice, in the absence of a plea, counter-claim, or notice to the adverse party showing the intention to recoup.—*Estep v. Morton*, 489

REFORMATION OF WRITINGS.

See FORECLOSURE, 2, 3.

REGISTRATION.

See PATENT.

RELATOR.

See PLEADING, 10.

RELEASE.

See CONTRACT, 1. ERROR, 2. EXECUTORS AND ADMINISTRATORS, 3. WITNESS, 3.

REMEDY.

See CONTRACT IN RESTRAINT OF TRADE, 6, 7. JUSTICE OF THE PEACE, 3. TOWNS, 2.

Where a special remedy is given by statute for the taking of private property in the construction of public works, that remedy only can be adopted.—*The Lafayette, &c., Railroad Company v. Smith*, 249

REPLEVIN.

See WITNESS, 5.

1. In replevin, under the R. S. 1843, if the goods specified in the writ were not found or replevied, or were not delivered to the plaintiff, by reason of his failing to give bond, &c., and their value as alleged, and as found by the verdict, was less than 20 dollars, the cause was not within the appellate jurisdiction of the Supreme Court.—*Jones v. Yetman*, 46
2. In replevin, the plaintiff having obtained possession of the property by giving bond, suffered a non-suit at the trial. *Held*, that the defendant, notwithstanding, had a right, under sec. 182, p. 702, R. S. 1843, to show the Court that he was entitled to the goods replevied, and thereupon to have judgment for their return, and a writ of inquiry for the assessment of damages for their detention.—*Mikesill v. Chaney*, 52
3. In replevin, the plea of *non detinet*, under the R. S. 1843, put in issue, not only the detention of the goods, but also the property of the plaintiff therein.—*Noble v. Epperly*, 414
4. In replevin, the plea of property in the defendant, imposes upon the plaintiff the burden of proving property in himself. *Ibid.*
5. The plaintiff in replevin, to maintain his action, must prove a right to the immediate possession of the goods. Proof of a joint ownership with the defendant, therefore, as a partner, or the like, is not sufficient. *Ibid.*
6. In an affidavit for a writ of replevin, before a justice of the peace, under the R. S. 1843, it was not necessary to allege that the property sought to be replevied had not been taken for any tax or assessment against the plaintiff, nor seized under any execution or attachment against his goods.—*Bringham v. Pollard et al.*, 452

7. The owner of a chattel can not maintain an action to recover the possession against one who has purchased it *bona fide* from a wrongful taker, until he has made a demand for its return.—*Wood v. Cohen et al.*, 455
8. In a suit, under the R. S. 1852, to recover the possession of personal property, if, under the issues, the defendant, in the event of success at the trial, would be entitled to a return of the property, the jury may find the value of the property, and damages for the detention thereof; and in case they omit to do so, the Court may direct them to supply such omission.—*Noble v. Epperly*, 468
9. If, in a suit under the R. S. 1852, to recover the possession of personal property, the defendant pleads property in himself, he is entitled, on a verdict in his favor, to a return of the property, and also to damages. *Ibid.*
10. The amount of damages, in such case, depends upon the defendant's interest in the property, whether as bailee, or absolute owner, the time he had been deprived of it, its character, &c. *Ibid.*

RESCISSION.

See CONTRACT, 7. VENDOR AND PURCHASER, 11.

RETAILING.

See CONSTITUTIONAL LAW, 9. INDICTMENT, 2. NUISANCE.

RIPARIAN RIGHTS.

See DAM.

1. Every riparian proprietor has an equal right to the flow of the water through his land; and no one has a right to use it to the material injury of those below him. If he diverts the stream, he must return it to its natural channel when it leaves his estate.—*Dilling v. Murray*, 324
2. But it is not every injury to a proprietor below that will confer a right of action: it is necessary, in every such case, to take into consideration the capacity of the stream, the adaptation of machinery to it, and all the attendant circumstances; and when all these are properly considered, if the proprietor below is materially injured, when considered in relation to the facts of the particular case, he is entitled to redress. *Ibid.*

S.

SALE.

See CONTRACT, 5 to 7. EARNEST MONEY. POSSESSION. SHERIFF'S SALE. VENDOR AND PURCHASER.

1. In a suit by the assignee against the maker of a note, given for the price of goods sold

to the defendant under false and fraudulent representations, the latter, if he did not return or offer to return the goods in a reasonable time, is liable for their value.—*Bischof v. Lucas*, 26

2. A person who not being a judge of an article himself, nor professing to be, purchases it, confiding in the representations of the seller as to its quality, and gives a note for the price, may show, in an action upon the note, the inferior quality of the article, in order to reduce the recovery. *Ibid.*
3. Growing corn is as capable of delivery as any other article of commerce.—*Weatherly v. Higgins*, 73

SCHOOLS.

See CONSTITUTIONAL LAW, 3.

1. The sixteenth section in the several congressional townships in this state was granted by congress to the inhabitants of such townships respectively, for the use of schools therein and not elsewhere; and the grant was accepted by the state on the terms in which it was made.—*The State v. Springfield Township, &c.*, 83
2. By the sale of the sixteenth section in the several congressional townships in this state, under the act of congress of 1828, the proceeds became trust funds, to be applied for the use of schools in such townships respectively, and not elsewhere. *Ibid.*
3. The act of congress of 1828 authorizing the sale of the sixteenth section in the several congressional townships in this state, and the several acts of congress reserving, and also those granting, the sixteenth section in the several townships in this state and other states for the use of schools, being in relation to the same subject-matter, are to be taken in *pari materia* and construed as one act, in ascertaining the purpose of the grant of the sixteenth section of the several townships in this state. *Ibid.*
4. The circumstance that when the sixteenth section in the several townships in this state was granted by congress to the inhabitants for the use of schools therein, there were, in some of the townships, no inhabitants, did not affect the validity of the grant. *Ibid.*
5. A repeal by the legislature of the act creating congressional townships, could not affect the validity of the grant by congress of the sixteenth section in those townships to the inhabitants for the use of schools therein, nor give the state any better right than it otherwise would have had to divert the funds derived from the sale of such sections. The grant in question was a contract executed, and incapable of revocation by the legislature. *Ibid.*

6. *Seemle*, that so far as the corporate capacity of the several congressional townships relates to the funds derived from the sale of the sixteenth section in such townships, they are private corporations created to meet the terms of the grant by congress of said sections, and their powers can not be repealed by the legislature. *Ibid.*

SCIRE FACIAS.

See EXECUTION, 1.

1. To a *scire facias* to revive a judgment after the defendant's death, and to obtain execution thereon against his real estate, the administrator and heirs of the defendant, if he died intestate, are proper parties.—*Graves et al. v. Skeels*, 107
2. The judgment for the plaintiff upon the *scire facias* should be, to make the money first of the assets in the hands of the administrator, and failing in this, then of the lands of the heirs. *Ibid.*
3. But the failure to render the judgment in this form is a mere informality, which, by the R. S. 1852, is to be regarded as amended in the Supreme Court. *Ibid.*
4. A *scire facias* to revive a judgment was substantially as follows: The state of Indiana, to the sheriff of *Vigo* county, greeting: Whereas, *A. B.*, for the use of *C. D.*, on, &c., in the *Vigo* Circuit Court, recovered a judgment against *E. F.* in a certain action of debt, to-wit, &c., (mentioning the amount of the judgment); and whereas, afterwards, and before execution thereupon had, to-wit, on, &c., said *E. F.* died intestate, and letters of administration were granted in due form to *G. H.*; and whereas said *E. F.* left as his heirs and terre-tenants *I. J.* (and others, naming them); and whereas, said judgment remains unsatisfied, as we are informed by said *C. D.*; we therefore command you to make known to said *G. H.*, as such administrator, and the said *I. J.* (and the other heirs, naming them,) and the terre-tenants, if there be any, that they appear before the judges of said *Vigo* Circuit Court, on, &c., to show cause, if any they have, why the said *A. B.*, for the use, &c., ought not to have execution of the goods, &c., of said *E. F.*, in the hands of said *G. H.* to be administered, and of the lands, &c., of which said heirs are seized as the heirs of said *E. F.*, deceased, for his debt and damages and costs aforesaid, and further to do, &c. The *scire facias* not having been demurred to, *held*, that it was sufficient on error. *Ibid.*

SEDUCTION.

See CONTRACT, 4. PARENT AND CHILD, 7, 8.

SHERIFF.

See EXECUTION, 5.

SHERIFF'S SALE.

See EXECUTION, 2 to 4.

1. If at a sale of land upon execution, the execution-plaintiff, by fraudulently representing that he is buying for the purpose of allowing the defendant to redeem, prevents competition, and purchases the land at a price greatly below its value, the defendant may have the sale set aside.—*Forelander v. Hicks*, 448
2. *A.*, in *February*, 1846, recovered a judgment against *B.*, in the *Franklin* Circuit Court, for 61 dollars. *B.*, afterwards, in *May*, 1846, being the owner of two lots in *Brookville*, mortgaged them to *C.*, to secure the payment of 168 dollars. In *August*, 1846, *D.* recovered a judgment in said Court against *B.* and others, for 146 dollars. The lots, which were worth from 350 to 400 dollars, were afterwards sold at sheriff's sale, for 11 dollars, to *D.*, on his judgment. Afterwards *D.* purchased *A.*'s judgment, exposed the lots to sale thereon, and himself became the purchaser at the sum of 20 dollars. *Held*, that as to *C.*, neither sale was void for inadequacy of price.—*Bertenshaw v. Moffitt et al.*, 464

SIXTEENTH SECTION.

See SCHOOLS.

SLANDER.

1. In slander, the averment in the declaration of a slanderous charge which assumes the existence of a fact, is a sufficient averment of such fact; especially on general demurrer or after verdict.—*Rodebaugh v. Hollingsworth*, 339
2. Whoredom includes every species of illicit intercourse between the sexes. *Ibid.*
3. A declaration for slander by a female plaintiff, showing a charge made against her of whoredom, is good. *Ibid.*
4. In slander, if the declaration is sufficient without regard to the *colloquium* or *innuendoes*, they may be regarded as surplusage. *Ibid.*
5. An inference expressed in the *colloquium* or *innuendoes* in a declaration for slander, if not a correct inference from the words averred to have been spoken, can not affect the sufficiency of such averments. *Ibid.*
6. *Colloquiums* or *innuendoes* are only necessary to remove uncertainty in the identification of persons, or in the meaning of words and sentences and their application. *Ibid.*
7. In cases of such uncertainty they form a material part of the declaration and can not be rejected as surplusage. *Ibid.*

SPECIFIC PERFORMANCE.

1. An application for a specific performance is addressed to the sound discretion of the Court.—*Ask et al. v. Daggy*, 259
2. Such discretion is not the individual discretion of the judge, but that judicial discretion which conforms itself to general rules and settled principles. *Ibid.*
3. Even where the contract sought to be enforced is in writing, a decree for a specific performance is not a matter of course, but rests in the sound discretion of the Court, in view of all the circumstances. *Ibid.*
4. Generally, it may be stated, that Courts of equity will decree a specific performance when the contract is in writing, is certain, is fair in all its parts, is for an adequate consideration, and is capable of being performed; but not otherwise. *Ibid.*
5. Bill for a specific performance of a contract for the sale of land. The facts were as follows: A., in February, 1847, agreed verbally with B. to sell to him twenty-nine acres of land, for 700 dollars, to be paid for when B. sold his pork. There was no part payment of the purchase-money. There was no evidence of any delivery of possession by A. further than this. When applied to for that purpose, he declined doing so, assigning as a reason that the land was under lease, until the next March, &c. B., in said month of March, took possession; whether with or without A.'s consent did not appear, further than that when A., in the spring of 1847, was applied to for the purpose of renting the land as pasture, he replied that he had sold it to B., to whom application should be made. In October, 1847, A. and wife acknowledged a deed for said land, in which B. was named as the grantee, and which A. remarked to the magistrate who took the acknowledgment, was intended for B. The magistrate had drawn the deed some time before by A.'s express directions, but what afterwards became of it did not appear. The bill averred a sale by B. of his hogs and a tender of the purchase-money in November, 1847; and a continued readiness to pay thereafter; and also a tender of the money and interest in Court; also, that B. had made valuable improvements. A. pleaded the statute of frauds, accompanied by an answer, without oath, denying the delivery of possession, the improvements, &c. The improvements made by B. consisted chiefly of clearing done, which were about compensated by the sale of cord-wood taken from the land. Held, that B., under the circumstances, was not entitled to a specific performance. *Ibid.*
6. A suit for a specific performance operates upon the person, and may properly be instituted in any county where the defendant resides.—*Coon et al. v. Cook*, 268

STATE BANK.

See VENDOR AND PURCHASER, 3.

STATUTE OF FRAUDS.

1. The statute of frauds applies to the rules of evidence and not to those of pleading.—*Miller v. Upton*, 53
2. An oral promise by A. to B. to indemnify B. against loss, if he will become replevin bail for C., is void under the statute of frauds.—*Brush v. Carpenter*, 78
3. If A. places in the hands of B. money to be paid to C., to indemnify him for having, as replevin bail, paid a judgment against A., and B. promises C. to pay C. the money, C. can sustain an action therefor. *Ibid.*
4. Our statute in relation to contracts not to be performed within a year, is substantially like that of 29 Car. 2, c. 3, s. 4, which has always been held to apply only to contracts which, by the express stipulations of the parties, were not to be performed within a year, and not to those which might or might not, upon a contingency, be performed within a year.—*Wiggins v. Keizer et al.*, 252
5. That statute has no reference to agreements founded upon a past consideration. *Ibid.*

STATUTES.

See APPEAL, 3. CONSTITUTIONAL LAW, 1, 4, 5. CONTRACT, 3. NUISANCE. RAILROAD COMPANY, 1 to 3, 9, 10, 13. SCHOOLS. TIME, 3. TOWNS. VENDOR AND PURCHASER, 3. VERDICT, 2. WARREN AND ERIE CANAL. WILL, 2.

1. The case of *Simington v. The State*, 5 Ind. R. 479, in which it was held that the act providing for the organization of Circuit Courts, &c., approved June 1, 1852, repealed so much of the act establishing Courts of Common Pleas, &c., approved May 14, 1852, as conferred upon the latter Courts jurisdiction, in certain cases, over felonies, referred to, and the decision approved.—*Miller v. Snyder*, 1
2. The R. S. 1852 did not take effect until in May, 1853.—*Webb v. Baird*, 13
3. The provisions of article 3, of chapter 40, of the R. S. 1843, relate only to civil suits. *Ibid.*
4. Courts will give a strict construction to statutes which are against common right. *Ibid.*
5. A statute requiring an attorney at law or other person to render gratuitous service in civil cases, can not be extended by construction so as to include criminal cases. *Ibid.*
6. Section 14 and the 4th clause of section 16 of chapter 59, R. S. 1843, do not continue in force section 25, p. 435, R. S. 1838. *Ibid.*

7. The provision in the R. S. 1843 on the same subject of section 25, p. 435, R. S. 1838, being an independent one and containing no words of continuance in relation to the latter section, repealed it. *Ibid.*
 8. The act approved January 12, 1850, allowing causes which originated in the Probate Courts to be taken by appeal or writ of error from the Circuit Courts to the Supreme Court, was repealed by the act creating the Court of Common Pleas.—*Duncan et al. v. Duncan et al.*, 28
 9. The act of 1848 to prohibit the sale of spirituous liquors in a less quantity, &c., in Wayne, Washington and Franklin townships, in Wayne county, although local, is not a private statute.—*Levy v. The State*, 281
 10. To constitute a statute a public act, it is not necessary that it should extend to all parts of the state: it is a public act if it extends equally to all persons within the territorial limits described by the statute. *Ibid.*
 11. The Court is bound to notice a public act without pleading it. *Ibid.*
 12. The provisions of section 8 of the act of 1848 "to reduce the law incorporating the city of Madison, and the several acts amendatory thereto, into one act," &c., so far as they relate to the licensing of persons to retail spirituous liquors, did not repeal, by implication, within the corporate limits of said city, the general provision in the R. S. 1843 upon the subject.—*Ambrose v. The State*, 351
 13. Where statutes passed at the same session of the legislature, though apparently conflicting, are not directly repugnant, they should be construed in *pari materia* as one statute, and so as to carry out what appears to have been the main intent of the legislature.—*The Board of Comm'rs, &c., v. Culler*, 354
 14. A local act approved January, 16, 1849, provided, that the auditor of La Grange county should receive 700 dollars *per annum*, which should be a full compensation for all services which he might perform as such officer. It also provided that it should be his duty, on the first Mondays in March and September of each year, to make to the county board, in such form as it should direct, a return in writing, comprising all the fees and emoluments of said office, and all compensation for labor in any manner received by him in virtue of said office, for the half year ending at that time, which return should be verified, &c. It further provided that it should be the duty of the board to make half-yearly allowances to such auditor of such sum as would make his half-yearly salary equal to 350 dollars, to be paid out of the treasury of said county. The act "to increase and extend the benefits of common schools," approved January 17, 1849, after requiring county auditors to perform the several duties, &c., which, before that time, belonged to the office of school commissioner, provided that for the discharge of such duties, &c., they should be allowed by the county boards one-half of one per cent. upon the amount of school funds on loan in their respective counties.
Held, that said statutes should be construed thus: For services relative to the school fund, each county auditor should receive, as a compensation, one-half of one per cent. upon the amount of that fund on loan in his county; *provided*, that the auditor of La Grange county should not be allowed such *per centum* in addition to his fixed salary of 700 dollars. *Ibid.*
 15. By the act of 1841, "to provide for the payment of the debts contracted by the late mayor and common council of the town of Lafayette, under the charter of said town," the board of commissioners of Tippecanoe county were constituted a Court of claims to adjudicate upon the demands against the late corporation, with power to levy and collect from the corporators alone the necessary taxes to pay said demands.—*The Board of Commissioners, &c., v. Cox*, 403
 16. Neither the auditor nor board of commissioners of Tippecanoe county had authority, under that act, to issue an order for the payment of a demand against the late corporation of Lafayette out of the general funds of the county. *Ibid.*
 17. A clause in section 26, p. 435, 2 R. S. 1852, was as follows: "If any person shall sell or give away intoxicating liquor to any minor, without the consent of his parent or guardian," &c., "he shall be fined," &c. An act approved March 4, 1853, entitled "an act to regulate the retailing of spirituous liquors and for the suppression of the evils therefrom," contained the following section: "All laws on the subject of retailing intoxicating or spirituous liquor heretofore enacted, are hereby repealed." *Held*, that this section repealed the clause in the R. S. 1852 above quoted.—*Hanning v. The State*, 432
- STREET.
See TOWNS.
- SUBSCRIPTION.
See RAILROAD COMPANY, 12, 13.
- SUMMONS AND SEVERANCE.
See APPEAL, 2.
- SUPERSEDEAS BOND.
See EJECTMENT. NUL TIEL RECORD.

PAYMENT.

See EVIDENCE, 3.

Where there are judgments of different dates against a debtor, in favor of the same creditor, he has a right to apply any voluntary payment to whichever judgment he chooses.—*Forelander v. Hicks*, 448

PLEADING.

See AMENDMENT, 2. CHANCERY, 2, 10, 11, 13. DISTRESS, 3. ERROR, 2 to 5, 8. EXECUTORS AND ADMINISTRATORS, 2. INTERROGATORIES. JUSTICE OF THE PEACE, 6 to 8. MISDEMEANOR, 2. OYER. PRACTICE, 11, 12. RECOURSEMENT. REPLEVIN, 3, 4, 6, 9. SCIRE FACIAS, 4. SLANDER, 1, 3 to 7. STATUTES, 11. SURPLUS REVENUE, 1, 3.

1. The assignee of a note given for the price of goods, can not, a recovery on the note being defeated, recover the value of the goods under the common counts.—*Bischof v. Coffelt*, 23
2. In a bill by administrators to foreclose a mortgage given to the intestate, they described themselves "as administrators of the goods," &c., "which were of" the intestate, giving his name and last residence. The bill also stated that on, &c., he died intestate, and that the complainants were duly appointed, &c. Held, that it sufficiently appeared that the complainants were administrators.—*English et al. v. Roche et al.*, 62
3. In assumpsit against a surviving partner, for goods sold to the firm, it is not necessary to notice the deceased partner in the declaration, but if it is done, the rules of pleading require a negative in the breach of payment by the deceased.—*Culbertson v. Townsend*, 64
4. The want of such negative can not, however, be objected to after verdict. *Ibid.*
5. *Nil debet* is bad in debt on a bond.—*Shook et al. v. The State*, 113
6. A defect in the mere form of a declaration can not be examined on demurrer to a defective plea. *Ibid.*
7. To a declaration upon an instrument which does not appear on its face to be usurious, a plea of usury must allege that an excess of interest was reserved with a corrupt intent. *Ibid.*
8. In a suit on a surplus revenue bond, an allegation in the declaration that the suit is brought "for the use of the surplus revenue fund," is mere surplussage. *Ibid.*
9. The pleader, in a suit on four surplus revenue bonds, (which contained a stipulation that in case of a failure to pay any installment of interest, the principal should become due and collectable, &c.) stated the

action to have accrued upon the non-payment of the annual instalments of interest; but the action was not brought until the principal on the last of the several bonds was due, and there was a breach to each count in which the non-payment of the bond was averred. Held, that the defect, if any existed, was cured by the breaches last named. *Ibid.*

10. The board of commissioners, treasurer, auditor, or any other officer who was charged by the R. S. 1843 with the duty of protecting and preserving the surplus revenue fund, was a proper relator in a suit on a bond given to secure a loan from that fund. *Ibid.*
11. Where the execution of a written instrument, referred to in the pleadings, is called in question, it must, by the R. S. 1852, be denied either by affidavit before trial, or by a pleading under oath.—*Unthank v. The Henry County Turnpike Co.*, 125
12. Sections 75 and 785 of the practice act do not apply to pleadings in denial of the execution of written instruments. *Ibid.*
13. A replication to a plea setting up a written instrument as the foundation of a defence, was not required by the R. S. 1843 to be sworn to; but if not sworn to, the execution of the instrument was not required to be proved.—*Russell v. Drummond*, 216
14. A demurrer was sustained to a paragraph of an answer, which set out, by way of defence, a written agreement. The agreement was admissible in evidence upon the trial of issues raised by other paragraphs. Held, (the contrary not appearing,) that the defendant must be presumed to have had the full benefit of the agreement.—*Bolton v. Miller*, 262
15. A defendant can not allege for error the overruling of a demurrer, where his defence was not prejudiced thereby. *Ibid.*
16. Suit for foreclosure. The mortgage was given to secure the payment of a note. To a paragraph of the answer setting up that neither the note and mortgage, nor copies thereof, had been filed with the complaint, the plaintiff replied that the note and mortgage were left in the clerk's office when the complaint was filed. Held, on demurrer, that the reply was insufficient.—*Lamson v. Falls*, 309
17. A reply is only necessary when new matter is set up in the answer. *Ibid.*
18. A demurrer to a reply was erroneously overruled, but the issue tendered by the reply was complete without it. Held, that the error was unimportant. *Ibid.*
19. The copy of a written instrument upon which a pleading is founded, is "filed with the pleading," within the meaning of the R. S. 1852, if it is set out in *hæc verba* in the pleading. *Ibid.*

20. Suit by the assignee of a note and of a mortgage given to secure it, for foreclosure. Answer, that the plaintiff was not the real party in interest. *Held*, that the answer was insufficient. *Ibid.*
21. A demurrer, under the code of 1852, does not extend beyond the pleading to which it is addressed.—*Mason v. Toner*, 328
22. The omission by a party to traverse a material fact alleged by his adversary, is, in effect, an admission of it.—*McClure v. Pursell*, 330
23. A count on a promissory note averred that "the defendant, by his certain note in writing, then due and payable, promised the plaintiff," &c. *Held*, on demurrer, that the undertaking of the plaintiff was sufficiently alleged.—*Epperly v. Little*, 344
24. A count which is not a nullity should not be rejected on motion.—*Haddy et al. v. Driver*, 350
25. Facts alleged in a complaint, which are not denied by the answer, are regarded as admitted.—*Hufford v. The State*, 365
26. A bill for foreclosure did not aver that the mortgagor had an interest in the premises capable of being mortgaged. It was objected for the first time, on error, that the bill was defective for the want of this averment. *Held*, that the objection, if available at all, should have been made in the Court below, at the earliest stage of the proceedings.—*Pattison et al. v. Shaw*, 377
27. A prior mortgagee is not a necessary party to a bill for foreclosure; nor is it clear that a junior mortgagee is, though he may properly be made a party. *Ibid.*
28. There is no rule of practice which authorizes a plaintiff to make the state a defendant in a cause. *Ibid.*
29. A material averment in an answer, which is not noticed by the reply, is regarded as admitted.—*Barker v. Hobbs*, 385
30. In a declaration upon an official bond payable to the state, the non-payment of the penalty need not be averred.—*The State v. Cross et al.*, 387
31. In a suit upon an official bond, the parties agreed to submit the issues of fact to a jury. *Held*, that the assessment of damages was included. *Ibid.*
32. In suits upon penal bonds, it is only upon the determination of questions of law in favor of the plaintiff, or upon a default, that the interlocutory judgment, that the plaintiff ought to recover, but because, &c., is given; and the Court may be substituted for the jury to assess the damages. *Ibid.*
33. In a claim for damages, under the R. S. 1838, for injuries to land occasioned by the construction of a public work, the same strictness is not required in the averments as in pleadings in a Court of record.—*The Martinsville, &c., Railroad Company v. Bridges*, 400
34. The written statement of the claim should show, however, whether the injury was occasioned by the passing through and appropriation of the claimant's land, or the taking of timber and other materials for which the statute provides. *Ibid.*
35. A claim for damages, governed by the provisions of the R. S. 1838, for an injury to the claimant's land occasioned by the construction of a railroad, stated that the land was injured, &c., to the amount, &c., as follows: that the road, as located, "angled" through the claimant's land, and passed over the same, &c., to the distance, &c., and over a part which was improved and cultivated; wherefore, &c. *Held*, that the statement was sufficient to enable the claimant to recover for the injury occasioned by the grading of the road, and the division of his land into inconvenient parts. *Ibid.*
36. Assumpsit against A. and B. on a note due five years after date, with interest payable annually, and if not paid when due, the principal to become due. A. was defaulted. B. pleaded the general issue, and a special plea alleging his readiness to pay the interest, but that the plaintiff fraudulently left the state to prevent a tender of it. Demurrer to the special plea sustained. *Held*, that the plea, if viewed as a plea of tender, or an excuse for not tendering the interest, was defective for not making *profer* of the money in Court. *Held*, also, that if regarded as a plea of fraud, its sufficiency was immaterial, the facts alleged being admissible under the general issue.—*Ausem v. Byrd*, 475
37. On the sustaining of the demurrer to the plea above mentioned, B. asked leave to file another plea, alleging that the note was obtained from him by the fraudulent connivance of the plaintiff and A., who represented to him that the note was payable unconditionally five years after date; that he was not a very good scholar, and that it was written in a hand which he could not readily read, &c. *Held*, that the plea was no defence to the action, and that therefore leave to file it was properly refused. *Held*, also, that had it been sufficient, yet the facts being admissible under the general issue, the refusal would have furnished no ground for reversing the judgment. *Ibid.*
38. A plea rejected on motion is no part of the record, unless made so by bill of exceptions.—*Chrisman et al. v. Melne*, 487
39. If in a suit tried on the general issue, a judgment has been rendered for the plaintiff,

we hereby assign to *Nicholas Longworth, of, &c.*, all our right and claim to, &c., (describing the quarter-section,) as witness our hands this 22d day of September, 1821. *C.* and *D.*, by the acting partner *D.* The instrument was attested by a witness. At this time the tract was unenclosed and covered with an unbroken forest. In 1822, *Longworth* appointed an agent to take charge of his purchase, and had ever afterwards continued the agency; the agent had constantly resided on or near the land; he had cut timber over the whole of it, and prevented others from cutting, warned people off of it, and employed other persons to watch trespassers and keep them off. He had paid the taxes on the tract; leased parts of it to different persons, &c.; but the whole tract was never enclosed; but it had been known even by the oldest inhabitants as the *Longworth* tract. In 1825, payment was made to the *United States* of the residue of the purchase-money, but there not having been forwarded to the land-office an assignment of the certificate given to *A.* and *B.*, the receipt and patent issued nominally to them. There was evidence tending to prove that the defendants knew the land belonged to *Longworth*; that it was in charge of his agent, and parcels of it in possession of his tenants; and that, with this knowledge, in January, 1852, they entered upon a portion of the cultivated part, commenced fencing it, working night and day, surrounded by a force, some of it armed, sufficient to repel opposition, and by threats, &c., did repel *Longworth's* agents from their attempts to remove their fence. The defendants claimed the right to enter upon the land by virtue of deeds from some of the heirs of *C.*, executed to them in 1851.

Held, that *Longworth* went into possession under color of title.

Held, also, that his possession covered the whole tract.

Held, also, that his possession for more than twenty years had perfected his title.

Held, also, that the jury were authorized to infer from the evidence a forcible entry and detainer. *Ibid.*

9. *A.* executed a title-bond to *B.* conditioned for the conveyance of a town-lot upon full payment of the purchase-money. *C.* having loaned to *B.* money to complete the payment, received from him an assignment of the bond, by way of security, and afterwards received a deed from *A.* *B.* having erected buildings on the lot, the mechanics instituted legal proceedings to enforce their liens. *C.* was a party. The Court decreed that the property should be sold and the proceeds applied, first to the discharge of the debt to *C.*, and next to the satisfaction of the mechanics' liens. *B.*, after the decree and before the sale, assigned his interest in

the lot to *D.*, who bid off the property at a sum exceeding the amount of the decree, and the sheriff returned to *D.* the surplus. Before the assignment to *D.*, *E.* and others having recovered judgments before a justice of the peace, filed transcripts thereof in the clerk's office to bind said real estate, and *D.* and the sheriff were notified of the fact before the sale. *B.* was insolvent.

Held, that the transcripts never became a lien upon the lot.

Held, also, that *E.* and others had no equitable claim upon said surplus.

Held, also, that the surplus was properly delivered by the sheriff to *D.*—*Davis et al. v. Cumberland et al.*, 380

10. *A.* grantee to whom land has been conveyed with a covenant against incumbrances, who claims to have discharged an incumbrance after the execution of the conveyance, must show that it was a valid and subsisting incumbrance when the deed was executed.—*Barker v. Hobbs*, 385

11. *A.* purchased from *B.* two town-lots, and received a title-bond, conditioned for the execution of a conveyance upon full payment of the purchase-money. Having failed to pay the last instalment, a judgment was obtained therefor before a justice of the peace. Execution thereon and a return of no goods, &c. To a bill by an assignee of the judgment against *A.* and *B.* to subject the lots to sale to satisfy the judgment, the defendants answered that *B.* only owned two-thirds of the lots, and hence could not convey according to contract. Replication, in avoidance, &c.

Held, that *A.*, had he elected, at the proper time, to rescind the contract, in consequence of the partial failure of consideration, would have been entitled to the purchase-money and interest, and would have had a lien on the lots for it; but, *held*, that having elected to retain them, he had an equitable interest therein at least to the extent of two-thirds, which might be subjected to execution upon said judgment.—*Dart v. McQuilty et al.*, 391

VERDICT.

See EVIDENCE, 16. JURY, 2. NEW TRIAL, 1. PRACTICE, 10.

1. The Supreme Court will not disturb the verdict of a jury, upon the mere weight of evidence, where the evidence is conflicting.—*Shanks v. Hayes*, 59
2. Section 336, p. 114, 2 R. S. 1852, authorizes the Court to direct the jury to find a special verdict, without being requested by either party.—*Weatherly v. Higgins*, 73
3. It is no objection to interrogatories submitted to the jury for the purpose of a special verdict that they are leading.—*Rice v. Rice*, 100

4. Indictment, charging the prisoner, *Thomas Kennedy*, with murder in the first degree. Verdict, "we, the jury, do say and find that *Thomas Kennedy* is guilty, in manner and form as he stands charged in the indictment, and that he shall be imprisoned in the state prison, and kept at hard labor during life." The act of 1843, in force when the verdict was rendered, provided, that upon an indictment for murder in the first degree, the jury might find the defendant not guilty of the crime in the degree charged in the indictment, and might find him guilty of such murder in the second degree; or they might find him guilty of manslaughter. *Held*, that the verdict showed, with sufficient certainty, that the prisoner was found guilty of murder in the first degree.—*Kennedy v. The State*, 485
5. When, under the act in question, the jury, under a single count charging murder in the first degree, find the prisoner guilty of murder in the second degree, the verdict should specifically name the offence of which he is found guilty. *Ibid.*

W.

WABASH AND ERIE CANAL.

1. Indictment against the persons composing the trustees of the *Wabash and Erie Canal*, for a nuisance in erecting a feeder-dam, &c., which was part of said canal. The dam was erected under the act of 1846 to provide for the funded debt of the state, and for the completion of said canal to *Evansville*. No act of wantonness was shown in the erection of the dam. *Held*, that the indictment was not sustained.—*Butler et al. v. The State*, 165
2. The act of March 4, 1853, (Acts of 1853, p. 17,) clearly manifests the state's intention to remit the punishment for the act on which the indictment in this case is founded; and in a case so anomalous as this, it is not perceived that any principle would be violated by giving it full effect. *Ibid.*

WATER-COURSE.

See DAM. NAVIGABLE STREAMS. RIPARIAN RIGHTS.

WHARF.

See INJUNCTION, 3, 4. TOWNS, 3 to 5.

WILL.

1. The conveyance by a testator of all the land owned by him at the time of making his will, operates to revoke it, and those after acquired do not pass by the will.—*Bowen et al. v. Johnson et al.*, 110

2. Section 4, p. 485, R. S. 1843, applies only to cases where the will purports to devise all the property equally, or in proportions, to all the devisees named in it, and not to cases where particular pieces of property are devised to particular devisees with a residuary clause. *Ibid.*
3. Where there are two provisions in a will which are totally inconsistent, that which is posterior in local position must be taken to denote the intention of the testator.—*Evans v. Hudson*, 393

WITNESS.

See EVIDENCE, 3, 14. EXECUTORS AND ADMINISTRATORS, 3.

1. Case by *A.* against *B.* for erecting a dam on *Blue river* below the plaintiff's mills, whereby the water was backed on his machinery. Plea, the general issue. On the trial (in March, 1850,) *C.*, who, prior to the commencement of the suit, had no interest in the mills, but had since acquired an interest in the profits by way of compensation for carrying on the business, was offered as a witness. *Held*, that he was incompetent.—*Cory v. Silcox*, 39
2. In a suit by a railroad company, a stockholder is a competent witness for the company.—*Unthank v. The Henry County Turnpike Co.*, 125
3. Where the record states that a witness released his interest, but does not state to whom, or how far it extended, and the Court below has held it insufficient, it will be so regarded in the Supreme Court.—*Stout et al. v. Morgan*, 369
4. A witness was admitted to testify, while the R. S. 1843 were in force, whose competency was objected to on account of interest. The extent of the interest of the witness was stated by the Court to the jury. The R. S. 1852 having taken effect during the pendency of the writ of error, *held*, that the interest of the witness furnished no ground for a reversal of the judgment.—*Wright v. Gaff et al.*, 416
5. Action by *A.* against *B.* and *C.* to recover possession of a horse. The complaint alleged that the horse was wrongfully taken by *B.*, and wrongfully detained by *B.* and *C.* *B.* answered, denying the wrongful taking and detention, and averring that he sold the property in good faith to *C.*, and that it was *C.*'s property. *C.* answered, denying the wrongful detention, and alleging the horse to be his property, &c. *Held*, that *B.* was a competent witness for *C.* on the trial; but to what extent he might be allowed to testify was not decided.—*Wood v. Cohen et al.*, 455

6. A negro is competent to testify, under the act of 1853, on the trial of a criminal charge against a negro.—*Woodward v. The State*, 492
7. When several persons are jointly indicted, but separately tried, either, if he consents, is competent to testify on behalf of the other.—*Everett v. The State*, 495

WORK AND LABOR.

See CONTRACT, 8. INFANT, 5.

WRITTEN INSTRUMENT.

See PLEADING, 12, 13.

1. A material alteration of an instrument made by a party who claims the benefit of it, without the consent of the party against whom it is sought to be enforced, renders it void.—*Stoner v. Ellis*, 152

2. Where the alteration of an instrument is of such a character as to defeat entirely its operation for any purpose, as in the case of the erasure of the signature and seal to a deed, or other instrument, so that, admitting all to be true that appears upon the instrument when produced, it would be void in law, it should be explained, in the first instance, before it should be permitted to go to the jury. In other cases, the instrument should be given in evidence, and should go to the jury, upon the ordinary proof of its execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But if there is neither intrinsic or extrinsic evidence as to when the alteration was made, the presumption of law is that it was made before or at the execution of the instrument. *Ibid.*

END OF VOL. VI.

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1. The first part of the document is a list of names and dates.

2. The second part of the document is a list of names and dates.

6. A negro is competent to testify, under the act of 1853, on the trial of a criminal charge against a negro.—*Woodward v. The State*, 493

7. When several persons are jointly indicted, but separately tried, either, if he consents, is competent to testify on behalf of the other.—*Everett v. The State*, 495

WORK AND LABOR.

See CONTRACT, 8. INFANT, 5.

WRITTEN INSTRUMENT.

See PLEADING, 12, 13.

1. A material alteration of an instrument made by a party who claims the benefit of it, without the consent of the party against whom it is sought to be enforced, renders it void.—*Stoner v. Ellis*, 152

2. Where the alteration of an instrument is of such a character as to defeat entirely its operation for any purpose, as in the case of the erasure of the signature and seal to a deed, or other instrument, so that, admitting all to be true that appears upon the instrument when produced, it would be void in law, it should be explained, in the first instance, before it should be permitted to go to the jury. In other cases, the instrument should be given in evidence, and should go to the jury, upon the ordinary proof of its execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But if there is neither intrinsic or extrinsic evidence as to when the alteration was made, the presumption of law is that it was made before or at the execution of the instrument. *Ibid.*

END OF VOL. VI.

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